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THE UNIVERSITY OF ALBERTA

THE INSURING INTENT OF THE COMPREHENSIVE GENERAL LIABILITY POLICY

© BY

HEATHER A. SANDERSON

A THESIS
SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF LAWS

FACULTY OF LAW

EDMONTON, ALBERTA
FALL, 1988

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled, THE INSURING INTENT OF THE COMPREHENSIVE GENERAL LIABILITY POLICY submitted by HEATHER A. SANDERSON in partial fulfilment of the requirements for the degree of MASTER OF LAWS.

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Date: Sept 20 1988

Abstract

This work describes the Insuring Intent of the Comprehensive General Liability (CGL) Policy: what the insurers intend the policy to cover. This is achieved by describing the coverage for bodily injury and property damage, plus six of the more litigious exclusions in light of the judicial construction placed upon the policy by the Canadian courts, and where there is no Canadian authority, the American courts. The work is based upon the 1978 Insurance Bureau of Canada model CGL wording. The purpose of the work is to explain, from the insurer's point of view, what the policy is intended to cover, with the hope that greater understanding of the intent will assist brokers and agents in advising potential insureds, legal counsel in advising both insurers and insureds, and the courts in interpreting the policy wording.

Acknowledgement

There is a myriad of people I would like to thank whose patience, understanding, and encouragement made this work possible. I cannot possibly name them all, and if there is no mention of your name, you know who you are, and I thank you. However, I would like to give a special "thank you" to Mr. Eric Holden for suggesting the topic, my supervisor, Professor Lewis Klar for his incisive comments, as well as his patience and forebearance in reading the drafts, Shaun Hunter for help in the production, and the lawyers of my firm who permitted me time from my practice to complete this work.

Above all I would like to thank my husband, Len, whose encouragement and support in ways too many to mention made this work possible in the first place.

HAS

Summary of Contents

1. Introduction to Comprehensive General Liability Insurance 1

2. The Anatomy of the CGL Policy: How it is Constructed, Read and Interpreted 13

3. Persons Insured Under the CGL Policy 34

4. The Meaning of "Legally Obligated to Pay" 48

5. Bodily Injury and Property Damage 79

6. Accident and Occurrence 110

7. Exclusion (a): The Contractual Liability Exclusion 150

8. Exclusion (b): The Automobile Liability Exclusion 174

9. Exclusion (h): The Fire and Property Damage Liability Exclusion 194

10. Exclusion (i): The "Product Itself" Exclusion 227

11. Exclusion (j): The "Work Performed" Exclusion 246

12. **Exclusion (k): The "Performance" Exclusion** 261

13. **Conclusion** 274

Bibliography 278

Appendix "A" 281

Appendix "B" 288

Appendix "C" 298

Vita 307

Contents

Chapter 1 INTRODUCTION TO COMPREHENSIVE GENERAL LIABILITY INSURANCE 1

Chapter 2 THE ANATOMY OF THE CGL POLICY: HOW IT IS CONSTRUCTED, READ AND INTERPRETED 13

1. How the CGL Policy is Read 13

The Declarations 15

The Insuring Agreements 15

The Exclusions 16

The Conditions 17

The Endorsements 17

2. Sources of Law Used to Interpret the CGL Policy 18

3. Rules of Construction Applicable to CGL Policies 21

4. Interpreting a Policy According to the Insuring Intent 30

5. Conclusion 32

Chapter 3 PERSONS INSURED UNDER THE POLICY 34

1. Where the Named Insured is a Sole Proprietorship 36

2. Where the Named Insured is a Partnership or Joint Venture 37

3. Where the Named Insured is Other Than a Sole Proprietorship or Joint Venture 38

4. The Real Estate Manager of the Named Insured 41

5. Where the Insured is a Partner or a Member of an Undesignated Partnership or Joint Venture 42

6. Severability 43

7. Conclusion 46

Chapter 4 THE MEANING OF "LEGALLY OBLIGATED TO PAY" 48

1. Whether "Liability Imposed by Law" or "Legally Obligated to Pay" Encompass Contractual Liability 50

2. Whether "Liability Imposed by Law" or "Legally Obligated to Pay" Include the Insured's Liability for Statutory Offences 64

    The Element of Wilfulness 65

    The Nature of the Fine 67

3. "Legally Obligated to Pay" and the Defence Agreement 69

4. Conclusion 76

Chapter 5 BODILY INJURY AND PROPERTY DAMAGE 79

1. Coverage For 'Bodily Injury' 80

Coverage for Long Term Exposure Disease 81

The Definition of "Bodily Injury" 83

"Bodily Injury" 84

"Sickness or Disease" 87

Whether the Consequences of "Bodily Injury" are Covered 88

Conclusion 88

2. Coverage for "Property Damage" 89

The 1955 Wording 91

The 1966 Wording 95

What is "Tangible Property"? 97

The 1973 Wording 102

3. Conclusion 108

Chapter 6 ACCIDENT AND OCCURRENCE 110

1. The Insuring Intent of "Accident" and How it is Viewed by the Courts 111

Caused by Accident 113

Sources used by the Courts to Interpret "Caused by Accident" 113

Whether "Accident" Includes Negligence on the Part of the Insured 115

Whether Reckless or Wanton Misconduct Causing Loss Constitutes "Caused by Accident" 119

Accident and the Element of Suddenness 133

2. Occurrence 135

The 1966 Policy Wording: Injurious Exposure to Conditions 135

The 1973 Policy Wording: Continuous and Repeated Exposure to Conditions 138

Conclusion 140

3. The Requirement that the Damage Must Occur During the Policy Period and Within the Policy Territory 141

4. Conclusion 147

Chapter 7. EXCLUSION (a): THE CONTRACTUAL LIABILITY EXCLUSION 150

1. The Purpose of Exclusion (a) 151

2. The Incidental Contracts 161

3. The Exception with Respect to A Warranty of Fitness of Quality of the Named Insured's Products 163

4. The Exception with Respect to a Warranty that Work Performed by or on behalf of the Named Insured will be done in a Workmanlike Manner 165

5. Conclusion 171

Chapter 8. EXCLUSION (b): THE AUTOMOBILE LIABILITY EXCLUSION 174

1. "Automobile" 175

2. "Arising Out Of" 180

3. "Ownership, Maintenance, Use or Operation" 184

4. Conclusion 192

Chapter 9 EXCLUSION (h): THE FIRE AND PROPERTY DAMAGE LIABILITY EXCLUSION 194

1. "Property Owned or Occupied by or Rented to the Insured" 197

"Owned" 198

"Occupied" 199

"Rented" 202

2. "Property Used by the Insured" 207

3. "Care, Custody and Control, or Property as to Which the Insured is for any Purpose Exercising Physical Control" 211

4. Damage to Personal Property or Fixtures as a Result of Work Performed Thereon by the Insured 219

5. Conclusion 223

Chapter 10 EXCLUSION (i): THE "PRODUCT ITSELF" EXCLUSION 227

1. The Definition of "Named Insured's Products" 232

Goods or Products 232

Handled or Distributed 235

Manufactured 236

Sold 237

Container 237

Any Product Rented to or Located for Use of Others but not Sold 238

2. Application of the "Product Itself" Exclusion 239

3. Conclusion 243

Chapter 11 THE "WORK PERFORMED" EXCLUSION 246

1. The Meaning of "Work" 248

2. The Meaning of "By or on Behalf of the Named Insured" 251

3. Examples of the Application of Exclusion (j) 253

4. The Impact of the Supreme Court of Canada's Decision in Foundation of Can. Erg. Corp. v. The Canadian Indemnity Co. Ltd. 257

5. Conclusion 259

Chapter 12 EXCLUSION (k): THE "PERFORMANCE" EXCLUSION 261

1. Loss of Use of Undamaged Property Due to a Delay in or Lack of Performance of a Contract 264

2. The Failure of the Named Insured's Products to Meet Warranted Fitness Levels 267

3. The Saving Provision of the "Performance" Exclusion 271

4. Conclusion 272

Chapter 13 CONCLUSION 274

Bibliography 278

Appendices A THE 1978 I.B.C. CGL MODEL POLICY 281

B THE 1986 I.B.C COMMERCIAL GENERAL LIABILITY POLICY (CLAIMS MADE WORDING) 288

C THE 1986 I.B.C. COMMERCIAL GENERAL LIABILITY POLICY (OCCURRENCE WORDING) 298

Vita 307

Chapter 1

Introduction to Comprehensive General Liability Insurance

Most people who own a home or a car are familiar with insurance--that invisible safety net that protects one from financial ruin should one's home go up in flames, or the car one has just financed end up in the wrecker's yard. What most people do not realize is that most homeowner's and auto policies also protect them from their liability to others should they accidentally cause a fire that burns down their neighbour's home, or in a moment's inattention, drive through a red light and collide with an oncoming car. The portion of the policy that performs this function is the liability section or rider. When through neglect or default, the person for whose benefit the rider is issued, the insured, causes injury to or damage to others, the liability portion of the policy provides a defence and indemnity against the legal consequences of being found liable to the person injured or damaged. For one global premium, home and vehicle owners can obtain property insurance that protects their property from such things as fire and theft, as well as obtain indemnity for a judgment entered against them when they accidentally harm others.

Business needs property insurance and liability protection as well. As most businesses deal with the public by providing services or marketing products, they have a greater chance of causing catastrophic harm to others than does the average person who has very little contact with the public in his private life. Comprehensive general liability insurance was created to meet the liability needs of the commercial world. It was given the name "comprehensive" because it is a blend of various types of policies to cover the specialized needs of business. Like its name, it is so general in scope that it can be issued to the electrician who operates out of his garage in Empress, Alberta, as well as to C-I-L Inc. to cover its operations throughout Canada and the United States. The purpose of the policy is to provide indemnity for businesses when their service or product injures or damages others.

Comprehensive general liability insurance came into general currency in 1935 with the development in the United States of the first comprehensive general liability (CGL) policy by the National Bureau of Casualty and Surety Underwriters and the National Casualty Insurance Rating Bureau. As insurers based in the United States did business in Canada, this type of insurance soon became widespread in this country.

The Insurance Bureau of Canada (I.B.C.) and a similar body in the United States, the Insurance Services Office, have drafted and filed sample policies to be used as a guide by the insurers who underwrite this type of insurance. These policies are referred to as the "standard form policies". The Canadian and American standard form policies are not identical but the differences are largely insignificant. There is no statutory regulation of the content of this type of policy. Some insurers cater to certain sectors of the market and consequently, their policies may be slanted towards those areas. Despite this, there are very few differences amongst the CGL policies offered by the various insurers, and most are very similar if not identical to the standard form I.B.C. CGL policy.

Over the years, there have been revisions to the standard form policy, both in Canada and the United States. The revisions were required as the courts have placed interpretations on the wording that the original draughtsmen never intended it to bear. The most significant revisions were made in the United States in 1966 and 1973. These changes were incorporated into the standard form I.B.C. CGL policies. The 1973 American wording is substantially the same as the 1978 Canadian wording.

In the late 1970's and early 1980's something occurred in the insurance industry that has been called "the crisis". Property and liability insurers, or as they are called in the industry, property and casualty insurers, began to see large underwriting losses[1] and looked to investment income to keep afloat. This was a complete turn-around from the 1950's and 1960's when "the underwriting result was the bottom line and investment income was the icing on the cake."[2] The situation which began to simmer in the late 1970's came to a boil early in 1985. At the end of 1984 insurers were paying out $1.12 in claims for every $1.00 of premium earned[3]--an unprecedented situation. Figures compiled for 1984 indicated that the Canadian insurance industry collected $487 million in premiums and paid out $526 million in claims and operating expense that year.[4]

In response to this situation, premiums soared. By January of 1986, day-care centres, fitness clubs, nursing homes and hospitals, school bus operators, private and public schools, and even Canada's national ski teams were facing prohibitive premium increases of as much as 1,200 per cent.[5] Those who could meet the increases found they were getting one-tenth of the coverage for six times the cost.[6] Turbo Resources Ltd. of Calgary found that it had to spend $1.5 million to obtain $10 million in coverage, when in previous years it purchased $25 million in coverage for $300,000 to $400,000.[7]

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[1] Premiums earned on policies were less than claims on those policies and operating expenses, resulting in what is known as an "underwriting loss".

[2] Noble, Kimberly *Cure for losses seen in rate increases*, The Globe & Mail, April 12, 1985, p. R6, quoting Edward Belton, President of the Insurers Advisory Organization.

[3] Ibid.

[4] Polanyi, Margaret *Soaring insurance rates the result as brokers confuse Canada, U.S.*, The Globe & Mail, January 16, 1986, p. A1.

What caused the underwriting losses and the resulting premium increases? Former Federal Consumer and Corporate Affairs Minister, Andre Ouellet charged that there was a "conspiracy" amongst insurers to drive up premiums.[8] The Insurance Bureau of Canada countered that insurers had fallen victim to the "deep pocket" theory: juries, primarily in the United States, awarded disproportionately high awards on the theory that wealthy insurers would pay the judgment.[9] These high awards drove up premiums across North America. Canada was placed in the same category as the United States. Insurers raised their premiums and lowered their levels of coverage, even though in many cases the safety record of Canadian business was much better than that of the United States.[10] Many businesses involved in high risk ventures such as oil and gas, transportation and toxic waste disposal, needed the financial backing of world insurance markets at a time when that market declined to take on these risks.

Blame cannot be laid solely at the feet of the courts in the United States. Other, more telling causes of the situation were:

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[5] Malarek, Victor *Beleaguered agencies face insurance rises of up to 1,200* % The Globe & Mail, January 11, 1986, p. A4.

[6] Ibid.

[7] Martin, Don *Businesses face 300 %premium hike*, The Calgary Herald, January 11, 1986.

[8] Steed, Judy *Insurance world quakes under the domino effect* , The Globe & Mail, January 24, 1986, p. A7.

[9] Ibid.

[10] Supra, n. 4 and n. 7.

--Environmental disasters such as occurred at Bhopal, India, when a gas leak at the Union Carbide plant poisoned and killed thousands of people in a matter of hours, sending insurers of chemical manufacturers reeling;

--Multi-billion dollar legal actions on behalf of workers who contracted fatal diseases by decades of exposure to asbestos have been commenced against the insurers of Johns-Manville, now known as Manville Corp.;

--An estimated 15,000 women suffered injuries over a period of years by using the contraceptive device known as the "Dalkon Shield" manufactured by A.H. Robbins;

--Vietnam war veterans are claiming that they suffered irreversible harm by being exposed to the chemical defoliant "Agent Orange";

--1985 was the worst year in commercial aviation history due to crashes and deaths, the most notable being the July crash of an Air India 747 jet into the Irish Sea killing all aboard;

--Insurers experienced at least two decades of underwriting profits. Premiums dropped to allow insurers to become more competitive in the market place. Insurers accepted the premiums from the transportation, pharmaceutical and chemical industries without adequately assessing the risks involved. As a result, from 1979 to 1983 the European reinsurers, the companies that finance the "front-line" insurers, suffered crippling losses,[11] and insurers lost the "capacity" to underwrite these potentially disastrous risks following the claims and potential claims reported in the early 1980's.

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[11] Coker, John *Reinsurers take steps to reduce their losses*, The Globe & Mail, April 12, 1985, p. R2.

The industry felt that steps had to be taken to change the CGL policy to permit insurers some control over the risks to which they were exposed. Traditionally, CGL policies were written on an "occurrence" basis. Under the "occurrence" policy, a worker could be exposed to asbestos in 1959, contract asbestoses in 1979, sue the employer in 1981, and have the claim paid by the insurer who covered the employer in 1959. This was the "long tail" of liability which insurers felt had resulted in the downturn of the 1980's. In many cases they felt that claims that materialized could not have been foreseen when the policies were issued, and consequently insurers had been unable to adequately assess the premiums. They felt that if liability insurance could be issued on a "claims made" basis, they would have better control over their exposure. Under the latter type of policy, insurers are only liable for claims and potential claims that are reported during the currency of the policy. In April of 1986 the Insurance Bureau of Canada issued two new CGL policies.[12] They had new names: *Commercial* General Liability Policies. One is a a revamped CGL policy issued on a "claims made" basis. The second has the same wording as the "claims made" policy, but is written on the traditional "occurrence" basis with a new limitation on the policy limits.

Although the wording of the policies was changed to a more "plain English" format, the coverages and exclusions remained substantially the same. The only change of note pertains to the Limits of Liability and the manner in which claims have to be reported in order to receive coverage.

A recent survey indicates that the softening of the insurance market, and problems regarding the marketability of the new I.B.C. policies, have resulted in only four out of 23 insurers implementing the occurrence based policy. None have implemented the claims made wording.[13]

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[12] IBC 2100 occurrence, and IBIC 2200 claims made were issued April 21, 1986.

Increased premiums and reduced coverages began a turn around which was noticeable by the end of March, 1986.[14] At the time of writing, the first two quarters of 1987 have passed and the insurance market, in the words of the industry, has "stabilized".[15] The improvement in the general liability sector is "particularly striking".[16] This will result in some stabilization of premium levels.[17] Nonetheless, it is still difficult to obtain coverage for products exported to the United States, professional liability, long-haul trucking, and those industries which pose a risk to the environment.[18]

The "crisis" that made the insurance industry front page news in 1984-1986 has eased, although some argue it is just an upturn in a cyclical industry. One of the effects of the crisis was to demonstrate how important the general liability sector of the industry is to the average Canadian. When liability insurance became hard to obtain, services were curtailed. For example, City of Calgary police spoke about denying groups parade permits because of the City's potential liability.[19] In the same vein, it was suggested that the Grand Marshal of the Calgary Stampede Parade ride a car, rather than a horse.[20] CGL insurance is by far the most common type of liability policy and is the backbone of the general liability insurance market. Despite this it remains largely misunderstood. Most insureds do not read the policy until they have a loss for which they wish indemnity. That is when they learn that the "comprehensive general liability policy" is not as "comprehensive" as they thought. This is unfortunate as it results in litigation where courts are asked to choose between an insured who thought he was obtaining coverage for the risk that materialized and the insurer who should have known that it did not provide the contemplated coverage, but accepted the premium anyway.

---

[13] It is generally recognized that claims made policies are only acceptable when there is no other insurance available. The occurrence policy has one aggregate limit applicable to all claims incurred in the policy period. When these limits are exhausted, there is no more coverage. Under the former occurrence based policy, the limits were applied on a "per occurrence" basis. For greater detail on these problems and the survey results, see Lee, Jack *The Cure that Failed*, Canadian Underwriter, June, 1987, pp. 34-37.

[14] Welsh, Lawrence *Liability squeeze has loosened. but car, court concerns remain*, The Globe & Mail, July 10, 1987, p. B20.

[15] Ibid.

[16] Barnes, Angela *Insurer's good fortune to stem rising rates* , The Globe & Mail, October 2, 1987, p. B1.

[17] Roy Elms, President of Royal Insurance Co. of Canada, as quoted in Barnes, supra, n. 16.

[18] Ibid.

[19] Ford, Catherine, *All of us pay for negligence* , Calgary Herald, October 1, 1987, p. A-4.

[20] Ibid.

The difficulty is that most agents and brokers who sell the policy to their clients, and the employees of the insurer's underwriting departments who accept the applications for insurance from the agents and brokers, do not understand it. There is no text book on CGL insurance. There is no agency or group that one can turn to as an information resource that will help to explain the coverage afforded by the CGL policy.

This work is an attempt to fill that need. It focuses on what the policy is intended to cover--the insuring intent behind the CGL policy. This intent is derived by looking at what the policy wording used to be, the way the courts interpreted it, and the revisions made in response to the judicial comment. The policy that is used is the 1978 I.B.C. CGL model wording issued by the Insurance Bureau of Canada. This policy is appended to this work as appendix A. This is representative of the wording currently used by insurers in the general liability market. Should the situation change and the 1986 wordings be implemented by the industry, this analysis will remain useful as the intent of the policy and the wordings remains substantially the same. The 1986 "claims made" policy is appended as appendix B, the 1986 "occurrence" policy is appended as appendix C. What follows is an outline of this work.

Chapter 2 completes the orientation to the policy by dealing with its structure, how it is read, and how the courts interpret it.

Chapters 3 to 6 discuss the salient parts of Section II of the Insuring Agreements, the clause entitled "Persons Insured".plus the Clauses entitled "Coverage A-Bodily Injury" and "Coverage B--Property Damage Liability" found in Section I of the section of the policy titled "Insuring Agreements". The later are the agreements which grant coverage to the insured. The other insuring agreements do not. In order to distinguish coverage agreements A and B from the other insuring agreements, they are referred to in this work as "Coverage Agreements A and B".

Four decisions must be made before it can be concluded that a CGL Policy will respond to any given loss: (1) whether the loss falls within the coverage agreements; (2) whether the coverage has not been withdrawn by an exclusion; (3) whether the basic coverage has not been modified by an endorsement; (4) whether the conditions have been complied with so that the claim is properly presented. These decisions must be made in the order given. A loss that is outside the coverage agreements is not excluded--it is not covered. This has important evidentary implications as the insured has the onus of proving coverage, and the insurer has the onus of proving an exclusion. An insured may face a non-suit if he fails to show that the loss falls within the coverage agreements.

A loss falls within the coverage agreements if: (1) the loss is suffered by someone who claims against a person insured by the policy; (2) the insured person is legally liable for the loss and must pay compensatory damages as a result; and (3) the loss is bodily injury as defined, or (4) the loss is property damage as defined, caused by an accident or an occurrence.

Chapter 3 considers who is insured by the policy. Chapter 4 discusses the requirement that the insured person must be legally liable for the loss. Chapter 5 discusses the meaning of "bodily injury" and "property damage". Chapter 6 considers whether an event constitutes an accident or an occurrence.

If after reviewing the coverage agreements, read together with the definitions in the policy shell, it is determined that the loss is covered, the next step is to read the exclusions together with those definitions to see if it is excluded.

It must be remembered that coverage is not determined by an exclusion. An exclusion never provides coverage--it denies coverage. Occasionally, an exception is made to an exclusion, such as those found in exclusions (a), (e), (h), and (k) of the 1978 I.B.C. CGL model policy. They simply limit the scope of the exclusion. They do not grant coverage.

When considering whether a particular loss is excluded, the coverage agreement and definitions are read with each exclusion independently of all other exclusions.[21] The exclusions are not interrelated.[22] If any one exclusion applies, then coverage is excluded, regardless of any inferences that may be drawn from any other exclusion as to the scope of that exclusion.[23]

The insurer has the onus of proving that an exclusion applies.[24] The insured has the onus of proving that an exception to an exclusion applies.[25]

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[21] Weedo v. Stone-E-Brick Inc., 405 A. 2d 788 (N.J., 1979).

[22] Ibid.

[23] Indiana Insurance Co. v. Dezutti, 408 N.E. 2d 1275 (Ind., 1980), at 1278.

[24] Consolidated Bathurst Export Limited v. Mutual Boiler Machinery Ins. Co. Ltd. [1980] 1 S.C.R. 889 (S.C.C.); Indemnity Ins. Co. v. Excel Cleaning Service, [1954] S.C.R. 169, [1954] 2 D.L.R. 721, (S.C.C.); Tested Truss Systems Inc. v. Canadian Indemnity Co., [1973] 4 W.W.R. 288, [1974] I.L.R. 892 (para. 1-605) (Alta. C.A.); Weston Ornamental Iron Works Ltd. v. The Continental Ins. Co., [1981] I.L.R. 477 (para. 1-1430) (Ont. C.A.).

The CGL model policy contains 15 exclusions:

> Their purpose is to remove from the coverage those hazards which are considered uninsurable; those which will not affect the average policyholder but which can be insured in specific situations for an additional premium; those which are insured by other policy forms, and through government bodies or special pooling agencies such as worker's compensation or the Nuclear Insurance Association of Canada.[26]

Hazards which are uninsurable are the "business risk" exclusions: exclusions (i), (j), (k), and (l). These deal with risks that are incidental to the conduct of business, and to some degree, can be controlled by the insured. Exclusions (a),(c), and (d), the contractual liability, marine, and aviation exclusions, exclude risks that do not affect the average insured but which can be insured in specific situations for an additional premium. Risks that can be insured under other policy forms are the subject of exclusions (b), and (h), the automobile and fire liability exclusions. Those risks that are insured through government bodies are the subject of exclusions (f) and (m), dealing with claims covered by workmen's compensation, and war hazards. Several insurance markets insure liability for bodily injury and property damage arising from the discharge of pollutants. As a result, exclusion (o) excludes this risk. As indicated above, the Nuclear Insurance Association of Canada deals with liability flowing from the use of nuclear energy. This risk is withdrawn by exclusion (n).

A review of the decided cases indicates that six of the 15 exclusions have been heavily litigated and appear to be the most misunderstood:

---

[25] Zatko v. Paterson Spring Service Limited, [1986] I.L.R. 7682 (para. 1-997) (Ont. H.C.); Model Jewellery Manufacturing Co. v. Western Assurance Co., [1962] O.R. 1099.

[26] Insurance Institute of Canada, *Insurance Against Liability*, Course No. 13, p. 11.

1. (a) The Contractual Liability Exclusion;
2. (b) The Automobile Liability Exclusion;
3. (h) The Fire Liability Exclusion;
4. (i) The "Product Itself" Exclusion;
5. (j) The Work Performed Exclusion;
6. (k) The Performance Exclusion;

Chapters 7 to 12 inclusive discuss these exclusions in the order given. Chapter 13 contains some concluding comments.

The preface to Chapter 3 to 12 inclusive contain the policy wording discussed in that Chapter. The words that are in heavy black or bold type are defined in the policy. They are not highlighted for emphasis.

Chapter 2

The Anatomy of the CGL Policy: How it is Constructed, Read and Interpreted

This chapter describes the parts of the CGL Policy, indicates the order in which they are read to determine if a given claim is covered, describes the sources of law used to interpret a CGL Policy, and comments on the judicial rules used to resolve coverage disputes.

2.1 HOW THE CGL POLICY IS READ

The CGL Policy is intended to respond to liability arising out of the operations of a corporation, general or limited partnerships, joint ventures, sole proprietorships, societies (such as clubs or religious organizations), or government bodies. Each business organization is unique with its own particular liability exposures. Some insureds may wish protection against tortious and contractual liability, others may wish this type of coverage plus other coverages. In view of this, insurers market commercial liability insurance so that insureds can select from the coverages offered and combine them into one policy.

This is achieved through a policy format divided into two parts: (1) the policy shell or jacket, and (2) the rider or coverage part. The policy shell contains the definitions, general conditions, and clauses dealing with inspection and audit, loss adjustment, and cancellation. The riders or coverage parts selected by the insured are then added to the policy shell. A rider is not an insurance policy in its own right. When it is read with the policy shell it can stand on its own. Through this type of format, the insured could select the general CGL rider which provides coverage for tortious liability, and the contractual liability rider, and receive coverage for both tortious and contractual liability. Alternatively, the insured could simply select the CGL rider and be protected against tortious liability. Each rider is read according to the definitions and conditions contained in the policy shell.

All references in this work to the "CGL Policy" refer to the CGL rider and the policy shell. References elsewhere to the "CGL Policy" would refer to the policy shell, the CGL Rider, and other coverage riders selected by the insured. The CGL Policy is one insurance policy that is composed of at least two documents; however, the physical division does not affect the way the policy is read.

The CGL policy has five parts. To determine if a given claim is covered, the parts must be read in the following order: (1) the declarations found on the face pages of the policy shell and the CGL Rider; (2) the insuring agreements found in the CGL

Rider read with the definitions found in the policy shell; (3) the exclusions, found in the CGL Rider, read with the definitions found in the policy shell; (4) the conditions, found in the CGL Rider and the policy shell; and (5) the endorsements, which are usually stapled to the back of the coverage rider to which they apply. What follows is a description of the purpose of each part.

(a) The Declarations

The first step in considering whether a claim is covered is to review the declarations. The declarations identify the insured, describe its form of business organization, the policy period, which coverage riders have been chosen, the limits of liability, and which hazards are insured.

There are two sets of declarations. The first set is the principal set, located on the first page, also called the face page of the policy shell. The second or subsidiary set is contained on the first page of the CGL Rider. The subsidiary set is read following the principal set.

(b) The Insuring Agreements

There are four distinct parts to the coverage agreements which collectively determine "whether the *event* is within the scope of the policy, and whether the *person* claiming protection is within the insuring clause which define the 'insured'."[27] The four parts of the coverage agreements are: (1) the principal coverages (Coverage A-Bodily Injury Liability, Coverage B-Property Damage Liability); (2) the insurer's defence obligations; (3) the persons insured clause; (4) the definition of "policy territory". Four of the terms used in these agreements are defined in the definition section of the policy shell: "bodily injury", "insured", "named insured", and "property damage". These definitions simply define the words used and "no coverage inference should be placed on the definition itself."[28]

If after considering the agreements it is determined that both the event and the person are covered, the exclusions are considered.

(c) The Exclusions

The exclusions restrict the scope of the broad coverage agreements by withdrawing certain events or persons from coverage. Each exclusion is read with the coverage agreements independently of all other exclusions. The CGL Policy has 15 exclusions.[29] The following terms, used in the exclusions, are defined in the policy shell: "automobile", "bodily injury", "incidental contract", "elevator" ,"insured", "named insured's products", and "property damage".

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[27] Hartwick, George K., *How to Read a Liability Insurance Policy*, 13 Hastings Law Journal (1961-1962), pp. 175-182, at p. 176.

[28] Tinker, George H., *Comprehensive General Liability Insurance--Perspective and Overview*, 25 Federation of Insurance Counsel Quarterly, pp. 217-309 at p, 223 (Spring, 1975).

[29] Only six of the exclusions are considered here: (a) the contractual liability exclusion; (b) the automobile liability exclusion; (h) the fire liability exclusion; (i) the "product itself" exclusion; (j) the "work performed exclusion; (k) the performance exclusion.

(d) The Conditions

The section of the CGL Rider entitled "limits of liability", and the section of the policy shell entitled "conditions", are generally referred to as the policy conditions.

The "limits of liability" indicate the policy's monetary limit--the upper limit of the insurer's financial exposure. The "conditions" impose specific obligations upon the insured which must be performed in the event of a loss, before the insurer will incur any liability to defend or indemnify the insured.[30]

(e) The Endorsements

The endorsements are special provisions which the parties have agreed to add to the policy which enlarge or restrict the policy's coverage as to person, event, or time. The endorsements are usually "standard form"--like the riders, their wording is usually not negotiated by the parties. They are usually numbered consecutively and placed following the last page of the CGL Rider. Appleman, *Insurance Law & Practice* , has this to say about the effect of an endorsement:

> In construing an endorsement to an insurance contract, the endorsement and the policy must be read together, and the policy remains in full force and effect except as altered by the words of the endorsement; conversely the endorsement modifies, to [the] extent of the endorsement, the terms and

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[30] The conditions are beyond the scope of this work.

> conditions of the original insurance contract...it does not abrogate or nullify any provision of the policy unless it is so stated in the endorsement.[31]

One of the more important endorsements is the "property damage occurrence (Defined Occurrence Basis)" endorsement. It transforms the CGL Policy from "an accident" based policy to "an occurrence" based policy.[32]

2.2 SOURCES OF LAW USED TO INTERPRET THE CGL POLICY

CGL policies must comply with the provincial statutory provisions regarding all insurance policies issued in a particular province. Other than this requirement, CGL policies are not regulated by provincial insurance legislation.[33] Nonetheless, this type of insurance is recognized by the Insurance Acts of the various common law provinces.[34] The Alberta Insurance Act[35] goes further by specifically sanctioning it:

> It is lawful for an insurer to contract to indemnify an insured against financial loss occasioned by reason of liability to a

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[31] Vol. 13A, 1976, at pp. 143-144.

[32] This endorsement is considered in Chapter 6 "Accident and Occurrence".

[33] Fire, life, auto, accident and sickness, livestock, hail and weather insurance policies are regulated by the provincial insurance acts.

[34] The insurance acts of the various common law provinces define insurance to mean:

> "The undertaking by one person to indemnify another person against loss or *liability for loss* in respect of a certain risk or peril to which the object of the insurance may be exposed or to pay a sum of money or other thing of value upon the happening of a certain event;" (emphasis added)

See: Insurance Act, R.S.A. 1980, c. I-5, s. (k.1); Insurance Act, R.S.B.C. 1979, c. 200, s. 1; The Insurance Act, R.S.M. 1970, c. I-40, s. 2(27); Insurance Act, R.S.N.B. 1973, c. I-12, s. 1; Insurance Act, R.S.N.S. 1967, c. 148, s. 2(j); Insurance Contracts Act, R.S. Nfld. 1970, c. 178, s. 2(i); Insurance Act, R.S.O. 1980, c. 218, s. 30; Insurance Act, R.S.P.E.I. 1974, c. I-5, s. 1(j); The Saskatchewan Insurance Act, R.S.S. 1978, c. S-26, s. 2(gg).

[35] R.S.A. 1980, c. I-5.

> third person, whether or not the loss is caused by the insured through negligence or while contravening any municipal by-law or any Act of the Legislature.[36]

As general liability insurance is not regulated by the provincial insurance acts, insurers are not obligated to issue uniform CGL policies.[37] The Insurance Bureau of Canada has prepared a sample policy shell, CGL rider and endorsements. These sample forms are virtually identical to the sample policy shell, CGL rider and endorsements issued in the United States by the Insurance Services Office. CGL Policies issued by insurers in Canada and the United States are modeled after these policies, and in many cases, the differences between the various policies are insignificant.

Canada lacks a well developed body of case law interpreting the CGL policy. This is also true of other forms of insurance. Canadian courts rely on American authorities in insurance cases, where there are no Canadian authorities that assist.[38] This practice was fairly sporadic until 1982. Since that time, one can find Canadian courts at all levels, from coast to coast, relying on American authorities in insurance cases.[39] This is particularly true where the policy before the court is identical to the policy considered in the American cases.[40]

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[36] Ibid., s. 218.

[37] The Alberta Insurance Act, supra, n. 28, s. 225(1):

> The Superintendent may require an insurer to file with him a copy of any form of policy or of the form of application for any policy or of any endorsement or rider or advertising material issued or used by the insurer.

For similar provisions in other provincial legislation see: Insurance Act, R.S.B.C. 1979, c. 200, s. 100(1); Insurance Act, R.S.N.B. 1973, c. I-12, s. 117(1); Insurance Act, R.S.N.S. 1967, c. 148, s. 10(1); Insurance Act, R.S.O. 1980, c. 218, s. 94(1); Insurance Act, R.S.P.E.I. 1974, c. I-5, s. 105(1).

[38] Keefer v. Phoenix Ins. Co. (1901), 33 S.C.R. 144; Berry v. Confederation Life Ass'n (1926), 22 Alta. L.R. 360, [1926] 3 W.W.R. 670, [1927] 1 D.L.R. 127 (Alta. C.A.), aff'd [1927] S.C.R. 595, [1927] 3 D.L.R. 945 (S.C.C.)

[39] *Alberta:* Leontowicz v. Seaboard Life Ins. Co. (1984), 36 Alta. L.R. (2d) 65, 58 A.R. 66, 16 D.L.R. (4th) 95, [1985] I.L.R. 7257 (para. 1-887), 8 C.C.L.I. 290 (C.A.) (American authority mentioned by the court faced with distinguishing accidental result and means as it occurred in a life insurance policy); *British Columbia:* Morguard Bank of Canada v. The Guarantee Co. of North America, [1987] I.L.R. 8440 (para. 1-2177) (B.C. C.A.) (court interpreted coverage under a Banker's Blanket Bond; no decided cases in British Columbia or elsewhere in Canada on point; American decisions should be considered carefully and to the extent that it is possible to discern what the law is in the United States, should try to keep Canadian law consistent with American law on general points of coverage.); *Manitoba* : Acklands v. Canadian Indemnity Co., [1985] 4 W.W.R. 71, 16 D.L.R. (4th) 95, [1985] I.L.R. 7344 (para. 1-1906), 8 C.C.L.I. 163 (C.A.), aff'g (1984), 29 Man. R. (2d) 203, [1984] 4 W.W.R. 764, 16 D.L.R. (4th) 637, 6 C.C.L.I. 209 (Man. Q.B.) (court interpreted a personal injury endorsement to a CGL policy distinguishing American authority at trial level); *New Brunswick:* Neill & Gunter Inc. v. Simcoe & Erie General Ins. Co. (1985),

Our legal heritage has nurtured a respect of English authorities among the judiciary. Canadian courts find English authority highly persuasive and follow it in all areas of law, including insurance, unless the Canadian case law or statutes conflict. If English authority conflicts with American authority, and no Canadian authorities assist, which body of authority should our courts adopt?

In Lizotte v. Traders General Ins. Co.,[41] the court accepted English authority in the face of conflicting American authority. However, this may simply have been because previously decided Canadian cases, which were not directly on point, but to which the court referred, had also tended to agree with the English position.

Canadian and American authorities should agree as much as possible where the policy provisions are the same. The reasons are threefold: the CGL policy is used by businesses in the United States and Canada; at the time of writing a "Free Trade" pact between Canada and the United States will almost certainly be ratified by Parliament; efforts should be made to promote some certainty in the North American economy.

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60 N.B.R. (2d) 351, 157 A.P.R. 351, [1985] I.L.R. 7208 (para. 1-1875), 11 C.C.L.I. 90 (court relied on the American encyclopedia, Couch on Insurane (2d), to interpret inconsistent clauses of an insurance policy; *Nova Scotia* : Royal Ins. Co. v. Trans Credit Corp. (1983), 58 N.S.R. (2d) 280, 123 A.P.R. 280, 149 D.L.R. (3d) 280, 1 C.C.L.I. 300, [1983] I.L.R. 6450 (para. 1-1680) (N.S.C.A.) (court relied on American authority to interpret the mortgagee's rights under an open loss payable clause in use in Canada and the United States); *Ontario*: Wigle v. Allstate Ins. Co. of Canada (1984), 49 O.R. (2d) 101, 14 D.L.R. (4th) 404, 6 O.A.C. 161, [1985] I.L.R. 7152 (para. 1-1863), 30 M.V.R. 167, 10 C.C.L.I. 1 (Ont. C.A.), application for leave to appeal to the Supreme Court of Canada dismissed March 25, 1985, 14 D.L.R. (4th) 404n. (S.E.F.-42, an uninsured motorist endorsement to an auto policy was interpreted according to American authorities); Saskatchewan: Wishlow v. Derow and British Aviation Ins. Co. Ltd. (1983), 22 Sask. R. 267, [1983] I.L.R. 6398 (para. 1-1666) (Q.B.) (court relied on American authority to interpret "engaged in" as it appeared in an exclusion to an aviation insurance policy).

[40] Morguard Bank of Canada v. The Guarantee Co. of North America, supra, n. 39.

[41] [1985] 1 W.W.R. 595, 10 C.C.L.I. 222, [1985] I.L.R. 7202 (para. 1-1874), supplementary reasons, [1985] I.L.R. 7569 (para. 1-1967) (B.C.S.C.).

Accordingly, when a court must choose between English and American authorities, it should chose the American authority over the English.

2.3 RULES OF CONSTRUCTION APPLICABLE TO CGL POLICIES

CGL Policies are interpreted according to the same rules as other insurance policies. Generally speaking, an insurance policy is to be interpreted according to the statute law that existed on the date of the event giving rise to the insured's claim for indemnity.[42] Similarly, the policy itself is to be construed as it existed on the date of the event giving rise to the insured's claim.[43] Endorsements added after the event do not affect the coverage that existed on the day of the event.[44]

Canadian courts have developed several rules to interpret the words and phrases of an insurance policy. Although the courts indicate that these rules are the same as those used to interpret ordinary contracts,[45] it is probably best to say that insurance contracts are interpreted according to the same rules as ordinary, standard form or adhesion contracts. In any event, the courts try to give effect to the presumed intention of the parties as expressed by the words contained in the policy.[46] The rules are as follows:

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[42] Ortved v. Bailey et al: Royal Insurance of Canada, Third Party and one other application, [1983] I.L.R. 6212 (para. 1-1617); Donald B. MacNeil Inc. v. Interstate Fire and Cas. Co., 477 N.E. 2d 1322 (Ill. App., 1st Dist., 1985). This comment applies equally to claims advanced by third parties who are seeking to have insurance proceeds applied against judgments they have registered against insureds.

[43] Ibid.

[44] Ibid.

[45] Beaulieu v. Reliance Ins. Co., [1971] 3 O.R. 75, 19 D.L.R. (3d) 399, [1971] I.L.R. 128 (para. 1-414) (Ont. H.C.); aff'd [1972] 1 O.R. 484, 23 D.L.R. (3d) 399, [1972] I.L.R. 235 (para. 1-446) (Ont. C.A.); Liverpool & London Globe Ins. v. Cdn. Gen. Elec. Co.,[1981] S.C.R. 600, 36 N.R. 541, 123 D.L.R. (3d) 513,[1981] I.L.R. 311 (para. 1-1392) (S.C.C.) (sub. nom. Cdn. Gen. Elec. Co. v. Liverpool & London Globe Ins.); Bar-Don Holdings Ltd. v. Reed Stenhouse et al (1983), 44 A.R. 246, 24 Alta. L.R. (2d) 248, [1983] I.L.R. 6282 (para. 1-1637) (Alta. Q.B.); New Forty-Four Mines v. St. Paul Fire Ins. et al (1984), 56 A.R. 335, 34 Alta. L.R. (2d) 28, [1985] I.L.R. 7189 (para. 1-1872), 9 C.C.L.I. 91 (Alta. Q.B.), rev'd on other grounds (1987), 78 A.R. 364, 53 Alta. L.R. (2d) 312 [1987] 5 W.W.R.

(1) The insurance contract must be read according to the common intention of the parties as expressed by the words used.[47]

(2) Written or typed provisions take precedence over printed provisions when they are inconsistent with each other. It is felt that they are clearly negotiated terms and hence reflect the parties' common intention.[48]

(3) Where the words used are precise, they must be given their ordinary meaning, and are not to be interpreted as technical expressions.[49]

(4) If the words used are clear and unambiguous, they must be given effect, despite the result that may follow.[50]

673(Alta. C.A.).

[46] Poole & Thompson Ltd. v. London & Lancashire Guar. & Accident Co., [1938] 4 D.L.R. 6, 5 I.L.R. 293 (S.C.C.); Seagate Hotel v. Simcoe & Erie Ins. (1980), 27 B.C.L.R. 89, [1980] I.L.R. 1098 (para. 1-1286) (B.C. S.C. T.D.).

[47] Parsons v. Standard Fire Ins. Co. (1880), 5 S.C.R. 233 (S.C.C.); McClelland & Stewart Ltd. v. Mut. Life Assur., 37 N.R. 190, 125 D.L.R. (3d) 257,[1981] I.L.R. 321 (para. 1-1393) (S.C.C.).

[48] Poole & Thompson Ltd. v. London and Lancashire Guar. Accident Co., supra, n. 46; Metal Stampings Ltd. v. Standard Life Assur. Co., [1951] O.W.N. 625, [1951] I.L.R. 191 (para. 1-038)(Ont. H.C.); Bar-Don Holdings Ltd. v. Reed Stenhouse et al. supra, n. 45.

[49] Guimond v. Fidelity Phoenix Fire Ins. Co. (1912), 47 S.C.R. 126, 9 D.L.R. 463 (S.C.C.); Ocean Construction Supplies Ltd. v. Continental Ins. Co. [1978] 5 W.W.R. 681, [1978] I.L.R. 1269 (para. 1-1035) (B.C.S.C.); Tomlinson v. Prudential Ins. Co., [1954] O.R. 508, [1954] I.L.R. 596 (para. 1-144); Farmer v. Great West Life Assurance Co., [1985] 7 O.A.C. 77, 10 C.C.L.I. 217, [1985] I.L.R. 7213 (para. 1-1877) (Ont. C.A.); Froelich v. Continental Cas. Co. (1956), 4 D.L.R. (2d) 62 , 18 W.W.R. 529, (Sask. C.A.).

[50] Dominion Bridge Co. v. Toronto General Ins. Co., [1963] S.C.R. 462, 45 W.W.R. 125, 40 D.L.R. (2d) 840, [1963] I.L.R. 535 (para. 1-108), [1964] 1 Lloyd's L.R. 194 (S.C.C.); aff'g (1962), 37 W.W.R. 673, 32 D.L.R. (2d) 374, [1962] I.L.R. 300 (para. 1-063) (B.C. C.A.); rev'g (1961), 34 W.W.R. 289, 27 D.L.R. (3d) 486, [1961] I.L.R. 123 (para. 1-025) (B.C. S.C. T.D.).

(5) The meaning of a word may vary according to its context. A general word may be limited by its context according to the interpretative rule, *noscitur a sociis*.[51] If words of a general meaning are used, they may be restricted to the same genus as the specific words which proceed them, if the specific words are of the same genus (*ejusdem generis*).[52]

(6) If the words and phrases used are ambiguous, the ambiguity is resolved in favour of the insured and against the insurer. This is referred to as the *contra proferentem* rule.[53] This rule is applied with particular vigour with respect to exclusions.[54]

(7) The courts are careful to ensure that exclusion clauses do not nullify the purpose for which the insurance was sold.[55] Accordingly, all limitations on coverage are construed against the insurer, in favour of the insured.

(8) All the provisions of a policy are to be given effect. Clauses are not to be construed as repugnant "unless irreconcilable with any reasonable interpretation which incorporates

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[51] Ibid., at p. 397 (32 D.L.R. (2d).

[52] For example, see Watts v. Centennial Ins. Co. (1967), 62 W.W.R. 175, [1969] I.L.R. 315 (para. 1-220), 65 D.L.R. (2d) 529 (B.C.S.C.T.D.).

[53] This is a commonly used abbreviation for the full Latin maxim: *verba chartarum fortius contra proferentem accipiuntur*. The leading case applying this maxim to a CGL policy is Indemnity Ins. Co. v. Excel Cleaning, [1954] S.C.R. 169, [1954] 2 D.L.R. 721, (S.C.C.).

[54] Consolidated Bathurst Export Limited v. Mutual Boiler & Machinery Ins. Co., [1980] 1 S.C.R. 889; Harbour Machine Ltd. v. The Guardian Ins. Co. (1985), 60 B.C.L.R. 360, (B.C. C.A.); Losier v. St. Paul Mercury Indemnity Co., [1957] O.W.N. 97 (Ont. C.A.); Tiko Electric Co. Ltd. v. The Canadian Surety Co. Ltd., [1973] I.L.R. 750 (para. 1-573) (Ont. Cty. Ct.).

[55] Indemnity Ins. Co. v. Excel Cleaning Service, supra, n. 53; Tested Truss Systems Inc. v. Canadian Indemnity Co., [1973] 4 W.W.R. 542, [1973] I.L.R. 677 (para. 1-552) (Alta. D.C.), aff'd [1974] 2 W.W.R. 288, [1974] I.L.R. 892 (para. 1-605) (Alta. C.A.); Tiko Electric Co. Ltd. v. The Canadian Surety Co.Ltd., supra, n. 54; Weston Ornamental Iron Works Ltd. v. The Continental Ins. Co. ,[1981] I.L.R. 477 (para. 1-1430) (Ont. C.A.); Portland Masonry Limited v. Casualty Co. of Canada et al (1984), 66 N.S.R. (2d) 10, 152 A.P.R. 10 (N.S. S.C. T.D.); Cansulex Limited v. Reed Stenhouse et al (1986), 70 B.C.L.R. 273, 18 C.C.L.I. 24, [1986] I.L.R. 8051 (para. 1-2090) (B.C. S.C. T.D.). In Tiko Electric, supra, n. 54, the court refused to apply an exclusion as it would "...deny utterly the comprehensive and general character of this liability insurance." (p. 753).

them as forming a harmonious plan for insurance of the nature contemplated by the parties."[56] If the clauses are repugnant, one of the following rules may apply:

(a) the clause which expresses the chief object of the contract must prevail;

(b) if both clauses were prepared by the insurer, the court will reject the clause which defeats the reason why the insurance was purchased and, or alternatively, give effect to the clause which affords the most protection to the insured;

(c) the first clause prevails over the second; in any event, a statutory clause prevails over a nonstatutory clause where they cannot be reconciled.[57]

(9) A heading which precedes a portion of a policy, such as an exclusion, is to be construed as part of the portion of the policy that it immediately precedes.[58] Therefore, if the heading is general in nature, the succeeding policy portion will be ascribed the general nature of the heading, even though the policy portion in question is specific rather than general.

(10) Where the above rules of construction are applied, and the court is unable to give the

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[56] Couch on Insurance (2nd ed.), vol 2, para. 15:46, accepted in Neill & Gunter Inc. v. Simcoe & Erie General Ins. Co., [1986] I.L.R. 7801 (para. 1-2025) (N.B. C.A.) aff'g (1985), 11 C.C.L.I. 90, [1985] I.L.R. 7208 (para. 1-1875) (N.B. Q.B.)

[57] Couch on Insurance, supra, n. 56, para. 15:47, accepted in Neill & Gunter Inc. v. Simcoe & Erie General Ins. Co., supra, n. 56.

[58] Braun v. Co-operative Fire and Casualty Co. (1982), 40 A.R. 358, 22 Alta. L.R. (2d) 370, (Alta. C.A.), aff'g [1982] I.L.R. 743 (para. 1-1498), leave to appeal to the Supreme Court of Canada, dismissed with costs, December 20, 1982.

policy a fair interpretation, the court should honour the reasonable expectations of the insured, despite policy provisions which appear to negate coverage, but only if the policy is ambiguous.[59]

The tenth rule of construction, known as the doctrine of reasonable expectations, is a recent development in Canadian law. The doctrine is borrowed from the United States where it has been developing since 1918.[60] Most insurers would agree with the following comments of a dissenting justice of the United States Supreme Court:

> Thus the problem in deciding an insurance claim seems no longer to be one of ascertaining what the contract as written means, but of somehow divining the "reasonable expectations" of the insured as to what the contract should mean.[61]

Canadian courts have referred to, discussed, and applied the doctrine on several occasions.[62] The doctrine was applied to deny coverage to an unnamed insured who caused an accident while intoxicated. To grant coverage would run contrary to the fundamental rule that a court should strive to effect the reasonable expectations of the parties. It would not be reasonable for an impaired driver to assume he was covered in the circumstances.[63] The doctrine was used to justify a finding that the objectively reasonable expectations of purchasers of underinsured motorist coverage are that it will cover all claims for bodily injury and death.[64] The court agreed with an argument advanced on behalf of an insurer that its total liability for pre-judgment interest and the loss itself does not exceed the policy limits. Such a holding does not confound the insured's reasonable expectations even when the policy is silent as to the insurer's liability to pay pre-judgment interest.[65]

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[59] Wigle v. Allstate Ins. Co. of Canada supra, n. 39.

[60] The noted American jurist Justice Cardozo is generally credited with formulating the doctrine in Bird v. St. Paul Fire & Marine Ins Co., 120 N.E. 86 (1918). A clearer statement of the principle came in his decision, Bach v. Frider Calculating Machine Co., 155 F. 2d 361 (6th Cir., 1946), at p. 365. Some years later, Mr. Justice Learned Hand refined the doctrine in Gaunt v. John Hancock Mutual Ins. Co. , 160 F. 2d 599 (2nd Cir.,1947); cert. denied, 331 U.S. 849.

[61] Collister v. Nationwide Life Ins. Co., 388 A. 2d 1346. 1347 (1978), Pomeroy, J., dissenting, cert. denied, 439 U.S. 1089 (1979). For other comments on the doctrine of reasonable expectations, see Krider, Scott B., *The Reconstruction of Insurance Contracts under the Doctrine of Reasonable Expectations*, 85 John Marshsall Law Rev. 155. 156; *Insured's "Reasonable Expectations" As to Coverage of Insurance Policy*, 20 Am. Jur. P.O.F. 2D 59 (1979); Gardner, *Reasonable Expectations: Evolution Completed or Revolution Begun?* Ins. L.J. 573 (1978); Keeton, *Insurance Lawyers View "Wayfaring Fool" Doctrine*, Insurance Advocate, 21 (July 24, 1971); Kelso, *Idaho and the Doctrine of Reasonable Expectations: A Spring-board for an Analysis of a New Approach to a Valuable But Often Misunderstood Doctrine*, 47 Ins. Counsel J. 325, 328 (1980); Abraham, *Judge-Made Law and Judge-Made Insurance: Honouring the Reasonable Expectations of the Insured*, 67 Va. L. Rev. 1151, (1981); Goodhue, *The Doctrine of Reasonable Expectations in Massachussetts and New Hampshire: A Comparative Analysis*, 17 New Eng. L. Rev. 891 (1982); *Reasonable Expectations Approach to Insurance Contract Interpretation Modified in Missouri*, 47 Mo. L. Rev. 577; Lashner, *A Common Law Alternative to the Doctrine of Reasonable Expectations in the Construction of Insurance Contracts*, 57 N.Y.U.L. Rev. 1175 (1982).

[62] Pettit v. Economical Mutual Ins. Co., (1982), 43 O.R. 344, 143 D.L.R. (3d) 752 (Ont. H.C.) (sub. nom. Re Petit and Economical Mutual Ins. Co.); White et al v. The Dominion of Canada Gen. Ins. Co., [1985] I.L.R. 7261 (para. 1-1888) (Ont. H.C.); Wigle v. Allstate Ins. Co. of Canada, supra, n. 39; United Realty Ltd. v. Guardian Ins. Co. of Canada, [1985] I.L.R. 7396 (para. 1-1923), 62 B.C.L.R. 297 (B.C.S.C.); Camairco Equipment Ltd. et al v. Breault, October 15, 1985, Ontario Dist. Ct., Trotter

As Canadian courts have only recently adopted the doctrine of reasonable expectations, it is difficult to assess how it will be used to interpret insurance contracts. The better opinion appears to be that it will only be applied where there is an ambiguity in the policy.[66] There should be no need to protect insureds from unambiguous policy exclusions. If the doctrine is applied regardless of ambiguity, insurers would be placed in an extremely unfair position.[67]

Once an ambiguity is found, the doctrine allows a court unbridled freedom to rewrite the insurance policy according to the insured's testimony regarding his expectations. This effectively removes insurance policies from other

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D.C.J.; Wu v. Malamus (1985), 67 B.C.L.R. 105, [1985] I.L.R. 7605 (para. 1-1980) (B.C. C.A.); Tinmouth v. La Groupe Desjardins Assurance, [1987] I.L.R. 8421 (para. 1-2172), 19 C.C.L.I. 268 (Ont. H.C.).

[63] Comairco Equipment Ltd. et al v. Breault, supra, n. 62

[64] White et al v. The Dominion of Canada Gen. Ins. Co., supra, n. 62.

[65] United Realty Ltd. v. Guardian Ins. Co. of Canada, supra, n.62.

[66] Wigle v. Allstate Ins. Co. of Canada Ltd., supra, n. 39. But see Pettit v. Economical Mut. Ins. Co., supra, n. 62, where the court appeared willing to apply the doctrine regardless of whether the policy was ambiguous. Most courts in the United States require ambiguity before the doctrine will be applied: *Reasonable Expectations Approach to Insurance Contract Interpretation Modified in Missouri*, supra, n. 61.

[67] This was recognized by the courts in Chipokas v. Travelers Indem. Co., 267 N.W. 2d 393 (Iowa, 1978); DiOrio v. New Jersey Mfrs. Ins. Co., 398 A. 2d 1274 (N.J., 1979).

species of contract. As one commentator stated:

> "Insurance contracts, like the vast majority of modern contracts are standardized to keep the cost of writing, performing and enforcing them within reasonable limits. The insurance purchaser usually agrees on the premium, the duration, the amount of coverage and the subject matter to be covered. The remaining provisions are written by the insurer only. Under traditional contract law, such a transaction is viewed as the formation of a negotiated agreement which is enforceable only to the extent the writing expresses the intent of the parties. Under the expectations doctrine, the same transaction is viewed as the formation of a non-negotiated agreement which is enforceable only to the extent the writing expresses the reasonable expectations of the insured.[68]

The courts should exercise great care when asked to declare a portion or portions of a policy ambiguous. They should be certain that the insured read the policy before the loss occurred, thought he was covered for a given loss and consequently derived an expecation of coverage. Courts that have applied the doctrine of reasonable expectations seem to ignore any obligation on the part of an insured to read the policy. They ignore what they have said on several occasions: it must be assumed that the insured has read the policy. If he has not read it, he cannot plead ignorance of the existence of the warranties on which the policy was expressly issued to rebut the insurer's claim that a loss is not covered.[69]

In Poast and Poast v. Royal Insurance Company of Canada,[70] the insurer issued an all-risk policy covering the insureds' tractor-dozer against fire. The policy was subject to a warranty which required the insured to carry a 30 pound fire extinguisher on the vehicle at all times. The tractor-dozer was not equipped with a fire extinguisher at the time it was destroyed by fire. The insurer denied the claim for the value of the vehicle. The insureds admitted receiving an envelope which was thought to contain the policy, but did not bother to open the envelope, paying no attention to it at all until the insurer denied the claim. The insureds argued that breach of the warranty should not affect the claim for indemnity as they had..." a right to expect the policy will not contain any unpleasant surprises, so they can leave the policy unread..."[71] The trial court rejected this argument stating, in part, that where, as here, the insureds had an opportunity to read their policy, they cannot excuse their ignorance of its contents.[72]

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[68] Krider, Scott B., *The Reconstruction of Insurance Contracts Under the Doctrine of Reasonable Expectations*, supra, n. 61, at 171.

[69] Guimond v. Fidelity Phoenix Fire Ins. Co., supra, n. 49, at p. 223 (S.C.C.), Provident Savings Life Assur. Society v. Mowatt (1902), 32 S.C.R. 147 (S.C.C.), rev'g 27 O.A.R. 675 (Ont. C.A.); see also, Lewis v. C.M. & M. Insurance Services Ltd. et al (1983), 51 N.B.R. (2d) 433, 134 A.R. 433, [1983] I.L.R. 6666 (para. 1-1729) (N.B. Q.B.); Pond v. Duvell, [1981] I.L.R. 5109 (para. 1-1343) (B.C.Cty. Ct.); Johnson v. W.G. Barton Ltd. (1986), 21 C.C.L.I. 73 (B.C. S.C. T.D.). Perhaps this obligation does not exist where an insured relies on his agent or broker to obtain the proper coverage: New Forty Four Mines Ltd. v. St. Paul Fire & Marine Ins. Co. et al, supra., n. 45; Carousel Travel Inc. v. Livio Ricci Insurance Broker Ltd. et al, [1987] I.L.R. 8344 (para. 1-2156)(Ont. H.C.). The obligation to read would obviously not apply where the insured does not understand the language the policy is issued in and this is known to the agent or the insurer: Reaume v. Caisse Populaire Windsor Limitee et al, [1987] I.L.R. 8452 (para. 1-2182)(Ont. H.C.).

[70] (1983), 21 Man. R. (2d) 67, [1983] I.L.R. 6467 (para. 1-1687) (Man. Q.B.), aff'd (1983) 24 Man. R.

As the New Brunswick Court of Queen's Bench stated in Moody v. Co-operators General Insurance Co.,[73]

> The mere fact that a policy must, of necessity, be written in comparatively small print does not excuse an insured from checking his policy to ensure that it complies with his wishes.

The arguments of the insureds in these cases appear to be based on the assumption that insurance is a chattel, to be dealt with in the same manner as office equipment. These arguments only harm those who espouse them as they will ultimately pay

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(2d) 293, [1983] I.L.R. 6617 (para. 1-1714) (Man. C.A.).

[71] Ibid, at p. 71 (21 Man. R. (2d)).

[72] This finding was not disturbed by the Manitoba Court of Appeal.

[73] (1985), 11 C.C.L.I. 285 (N.B.Q.B.), at p. 291. In that case, the insured had "comprehensive" auto collision coverage in England. He came to Canada and requested the insurer's employee to issue him "comprehensive" coverage. The terms meant different things in England and in Canada. The insured was not aware of this and did not read his policy. The insured was not covered for the loss in question. The insured was was held 50% contributorily negligent for failure to read his insurance policy. The insurers bore the remaining liability as its employee should have realized that the insured did not understand the coverage he was purchasing.

the premium increases levied to cover the risk of unenforceable coverage restrictions.[74]

A proper case for the application of the doctrine of reasonable expectations would be where the insured has read his policy, felt it complied with his wishes, only to find out that his objective, reasonable expectations have been negated by ambiguous, turgid policy wording. If after the other rules of construction are applied, the policy is still ambiguous, then and only then should the doctrine be applied. This would prevent the courts from quickly declaring an ambiguity and applying the doctrine before clearly analysing the policy wording. In the interests of commercial certainty, the policy wording must be honoured if at all possible.

If the courts consistently used this approach, insurers would be forced to write clearer policies with "easy-to-read" formats. All too often courts are asked to construe policy provisions containing appalling grammar and legalese.[75] Adverse judicial construction of insurance policies encourages the draughtsman to write technical and complex policy provisions in an attempt to clearly define the respective rights and duties of insurers and insureds. The result is what the New York Supreme Court termed:

> ...the most formidable type of obfuscation which no trained person, let alone a layman, can truthfully say is anything but the cant of the insurers. It is, unfortunately, not within the province of this Court to order that policies be written briefly and lucidly.[76]

Expression of complex ideas does not require complex language. Insurers must draught their policies so that the average layperson exercising reasonable diligence can understand the coverage purchased. Failure to write readable policies will only result in widespread application of the doctrine of reasonable expectations, which in turn will result in court decisions holding that policies will cover risks never contemplated by the underwriters when the premiums were assessed.

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[74] Krider, Scott B., *The Reconstruction of Insurance Contracts Under the Doctrine of Reasonable Expectations*, supra, n. 61, 171.

[75] See the comments of the Alberta Court of Appeal in Travellers Indemnity Co. of Canada v. Werner, [1985] I.L.R. 7441 (para. 1-940) (Alta. C.A.).

[76] Brainard v. Aetna Cas. & Sur. Co., 187 N.Y.S. 2d 435, at 437 (Sup. Ct., 1959).

2.4 INTERPRETING A POLICY ACCORDING TO THE INSURING INTENT

The various rules used to interpret CGL policies have the same object, which was ably summarized by Rand, J., in Canadian Indemnity Co. v. Andrews and George Co. Ltd.,[77] :

> ...[the policy]..., subject to the long established qualifications, must , of course, be read according to the ordinary meaning of its language; but "meaning" itself has rather shadowy boundaries and even ordinary language must, for a true understanding of what the parties meant by it, be construed in the context and the circumstances out which it has arisen.[78]

CGL policies and other insurance policies have arisen out of long established underwriting practice. This practice shapes the terms and conditions used in the policy. It is fair to look at the underwriting practice to determine the meaning of the policy wording.

The Saskatchewan Court of Queen's Bench looked at the exclusions of an aviation insurance policy and noted that taken together, they exclude use of the the aircraft in dangerous circumstances.[79] It concluded that the object of the policy was to insure the aircraft against physical loss or damage when it was not engaged in dangerous activities.[80] The Court then went on to construe the disputed wording in light of that object.

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[77] [1953] 1 S.C.R. 19, [1952] 4 D.L.R. 690, [1952] 4 W.W.R.37, [1952] I.L.R. 369 (para. 1-089)(S.C.C.).

[78] Ibid. at p. 24 (S.C.R.).

The Ontario High Court relied on the evidence of a witness experienced in underwriting jewellery block insurance to interpret disputed wording in a warranty to the policy.[81] The Court noted that this is the best evidence of what the insurer or underwriter meant to cover, and that it would be "...most illogical to hold that the policy does not cover an occurrence of a class the underwriter intended to cover, and for which it charged a premium."[82]

The Supreme Court of Canada was asked to determine if a CGL policy covered losses caused by professional negligence.[83] The Court looked to the evidence of the insurer's casualty manager who stated that professional liability is not covered by a CGL policy as separate coverage is available for that type of risk. The Court noted that the available literature confirmed this statement and concluded:

> Of course, what has to be examined is the contract of insurance. But I cannot avoid the conclusion that the text of the policy expresses the practice which itself is founded on the distinction between general liability insurance and professional negligence coverage. Exclusion H, examined by the Court of Appeal, is but an application of that approach.[84]

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[79] Wishow v. Derow and British Aviation Ins. Co. Ltd., supra, n. 39.

[80] Ibid., at p. 270 (Sask. R.).

[81] Machat Jewellery Ltd. et al. v. Jenkins et al. [1981] I.L.R. 5037 (para. 1-1319) (Ont. H.C.), aff'd [1983] I.L.R. 6196 (para. 1-1610) (Ont. C.A.).

[82] Ibid., at p. 5041 ([1981] I.L.R.).

[83] Foundation of Canada Engineering Corp Ltd. v. Canadian Indemnity Co. et al. [1978] 1 S.C.R. 84, 74 D.L.R. (3d) 266, [1977] 2 W.W.R. 75 [1977] I.L.R. 440 (para. 1-832) (S.C.C.).

[84] Ibid., at p. 272 (D.L.R.).

In each of these cases, the courts tried to define the object of the policy--the insuring intent--and interpreted the wording according to that object. Evidence of the insuring intent was derived from the language used and the testimony of the insurer's representatives.

The policy's insuring intent is the basis of the insurer's defence in a coverage dispute. An insurer attempts to lead evidence as to the underwriting practice out of which the policy emerged. It will indicate the reason why a certain exclusion, term, or condition was placed in the policy, and demonstrate how that reason is expressed in the language used in the policy. It will then indicate whether the facts of the claim do or do not fall within the language chosen. If the evidence indicates that the insurers never intended to cover the type of claim presented by that particular wording, the court should conclude, subject to the rules used to interpret insurance contracts, that the loss is not covered.

2.5 CONCLUSION

To determine if a given claim is covered by the CGL Policy, one reads the policy in the following order: the declarations, coverage agreements, exclusions, conditions and endorsements. In a case where coverage is disputed, one looks to the decided cases to determine how the policy has been interpreted in the past. The principles emerging from those cases are applied to the policy according to judicially prescribed rules of construction.

Canadian Courts do not hesitate to look to American case law where there are no Canadian cases on point. The willingness to look to American cases has led to the acceptance of the doctrine of reasonable expectations that originated in the United States. It is too early to predict how Canadian courts will apply this doctrine; however, the potential exists for the courts to re-write policies that they are asked to construe according to their notion of justice in the particular case. Applied broadly, this doctrine ignores the policy provisions and any obligation on the insured to read the policy.

Canadian courts have recognized an obligation on the insured to read his policy. Additionally, they have demonstrated a willingness to construe a policy according to the insuring intent as expressed in the wording used and the context in which it was written. If a court can accept that a reasonably competent layperson could understand the policy's insuring intent by reading the policy wording, and therefore understand that coverage does or does not exist, there would be little need for the doctrine of reasonable expectations. Consequently, courts should determine that the insured read his policy and derived his coverage expectation from reading it. The court should apply the traditional rules regarding the interpretation of insurance contracts and determine if the insured's understanding was reasonable. If they find that the policy is ambiguous and that the ambiguity defeats the insured's expectation of coverage,. then and only then should the doctrine be applied. Before this can occur, the policy's insuring intent must be expressed in clear and lucid terms. Perhaps the reason why policies contain such turgid prose is because the draughtsmen do not understand the insuring intent of the policies they issue and revise.

What follows is a discussion of the insuring intent of the CGL policy as expressed in the principal coverage agreements and some of the more important exclusions. It is hoped that this work will assist the draughtsman to produce clearer, more lucid policy wording which will assist the consumer, the lawyer advising the consumer, the judiciary, and hence the industry as a whole.

Chapter 3

Persons Insured Under the CGL Policy

Section III of the Insuring Agreements, entitled "Persons Insured", states:

> Each of the following is an **Insured** under this insurance to the extent set out below:
>
> (1) if the **Named Insured** is designated in the declarations as an individual, the person so designated but only with respect to the conduct of a business of which he is the sole proprietor;
>
> (2) if the **Named Insured** is designated in the declarations as a partnership or joint venture, the partnership or joint venture so designated, and any partner or member thereof but only with respect to his liability as such;
>
> (3) if the **Named Insured** is designated as other than an individual, partnership or joint venture, the organization so designated and any executive officer, director or stockholder thereof while acting within the scope of his duties as such;
>
> (4) any person (other than an employee of the **Named Insured**) or organization while acting as a real estate manager for the **Named Insured**.

> This insurance does not apply to bodily injury or property damage arising out of the conduct of any partnership or joint venture of which the Insured is a partner or a member and which is not designated in this policy as a **Named Insured**.

"Named Insured" is defined in the definition section of the policy shell:

> "Named Insured" means the person or organization named in the Declarations of this Policy.

"Insured" is also defined:

> "Insured" means any person or organization qualifying as an Insured in the "Persons Insured" provision of the applicable coverage rider. The insurance afforded applies separately to each Insured against whom claim is made or brought except with respect to the limits of the Insurer's liability.

The "Named Insured", and the persons who hold the status of an "Insured", are identified by reading the Declaration page of the policy shell with the "Persons Insured" clause. Item one of the Declaration page contains blanks where the name and address of the insured are written in. The person or organization listed there is the "Named Insured". The Named Insured's business organization is listed in item two of the Declarations. If the Named Insured's business is other than a proprietorship, partnership, corporation, or joint venture, it must be specified.

Item two is crucial. The type of business of the Named Insured determines which parts of the "Persons Insured" clause apply. For example, if it is indicated that the business of the Named Insured is a sole proprietorship, part (1) of the clause applies and the sole proprietorship is an insured but only with respect to the conduct of its business. An employee of the sole proprietorship is not insured. Employees will only be considered "insureds" if the business organization of the Named Insured is other than a sole proprietorship, partnership or joint venture, and they qualify as "executive officers".[84]

"Coverage is keyed to the business operations of the Named Insured..."[85] The purpose of the CGL Policy is to provide the business, and those who operate the business, its executive officers, directors, stockholders and real estate managers, with public liability coverage.[86]

3.1 WHERE THE NAMED INSURED IS A SOLE PROPRIETORSHIP

This clause presents little difficulty. Where the named insured is a sole proprietorship, the sole proprietor will be insured against liabilities incurred in the conduct of the business, including vicarious liability for the tortious conduct of his employees. Note that the sole proprietor's employees are not covered for their liability to others as they are not persons insured under the policy.

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[84] See clause (3) of the "Persons Insured" clause. For an illustration of this concept, see Jones v. United Automobile Assoc., 299 So. 2d 894 (La. App., 1974). It is implied in the case of Bourgeois v. Lloyd's,[1966] I.L.R. 151 (para. 1-175) (Que. C.A), that if item two of the declarations is incomplete, or, if the business organization of the named insured is not specified, the court is free to construe the policy as a whole ,and ascertain to whom, or to what type of organization the policy was issued.

[85] Tinker, George, H. *Comprehensive General Liability Insurance--Perspective and Overview*, 25 Federation of Insurance Counsel Quarterly 217, at p. 235 (Spring, 1975).

[86] Ibid.

3.2 WHERE THE NAMED INSURED IS A PARTNERSHIP OR JOINT VENTURE

Although partnerships and joint ventures do not have legal personality, they enjoy the status of "Named Insured" if it is declared that they are carrying on business as a partnership or joint venture. Each partner of the partnership, and each member of the joint venture are "insureds" under the policy, but only with respect to "his liability as such".

The use of the personal pronoun "his" gives rise to interpretive difficulties. The partners of a partnership and the members of a joint venture are often corporations. Are these corporations "insureds"? The word "his" implies that only human beings are insureds. However, "partnership" and "joint venture" are not used with limitations such as "partnerships of persons" or "joint ventures composed of persons". Further, clauses (1) and (4) of the "Persons Insured" clause refer to human beings as "person(s)". In view of this ambiguity, it is likely that the courts will grant corporations that are partners or members of joint ventures, the status of insured persons under the policy. This is an example of the poor draughtsmanship that unfortunately appears to be endemic to CGL Policies.

As "partnership" is not limited by the adjectives "general" or "limited", it must be broadly interpreted to include both types of partnership. The partners of a partnership, and the members of a joint venture, will receive full protection under the policy for liabilities that they may incur, arising from the wrongful acts or omissions of a co-partner or member, acting in the ordinary course of business of the partnership or joint venture. The policy does not afford coverage to partners or members of a partnership or joint venture for liabilities arising out of personal activities. As Aylesworth, J.A., stated with respect to a professional liability policy in Kennedy, Ross and Velanoff v. Canadian General Insurance Co.: [87]

> Two things are abundantly clear in the view of all members of this Court. The first thing in which we find ourselves in agreement is that the policy of insurance is a policy of insurance extended to the firm of solicitors and covering errors, omissions and the like which may have occurred in the policy period with respect to the carrying on of the business of solicitors in that firm and that it is not a matter of individual coverage except that each and every partner as a partner in the business is covered. It follows from that that any claim under the policy is not an individual claim but it is of necessity a claim by or on behalf of the partnership. It is equally clear to us in these circumstances, that there is no right of an individual partner either to sue upon such a claim or if judgment be given against the partnership in an action on such a claim, individually and in his personal capacity to appeal from that judgment.

3.3 WHERE THE NAMED INSURED IS OTHER THAN A SOLE PROPRIETORSHIP, PARTNERSHIP OR JOINT VENTURE

Clause (3), which deals principally with corporations and unincorporated associations, presents some difficulty. This clause confers the status of "insured" on any executive officer, director, or stockholder of a business organization, that is other than a sole proprietorship, partnership or joint venture.

The difficulty with this clause lies in determining what is meant by "executive officer". Who are the executive officers of a business organization? What degree of responsibility, and what type of function elevates an employee or office holder to the status of an "executive officer"? Are tool pushers, ramrods, supervisors, or drilling superintendents, "executive officers" of an international oil company? The answer is "no".[88] Is a foreman and welder who is paid by the hour an "executive officer"? The answer is also "no"[89] Is a production officer of a mine, who meets with the mine superintendent every morning and afternoon to help formulate mine policy, who is in charge of all production, 14 pieces of valuable equipment, and 11 men who he can fire at will, an executive officer of the mine? The answer is "yes".[90]

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[87] (1960), 22 D.L.R. (2d) 687 (Ont. C.A.), at p 688-689.

The "executive officers" of corporations are usually the "officers" of corporations. The former federal companies act, The Canada Corporations Act,[91] defined "officer" as follows:

> "Officer" means the president, chairman of the board of directors, vice-president, secretary, assistant secretary, treasurers, assistant treasurer, or any other person designated an officer by by-law or by resolution of the directors.[92]

The current act, the Canada Corporation Act,[93] does not define "officer". However, it provides:

> Subject to the articles, the by-laws or any unanimous shareholder agreement the directors may designate the offices of the corporation, appoint as officers persons of full capacity specify their duties and delegate to them powers to manage the business and affairs of the corporation...[94]

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[88] Brace v. Travelers Ins. Co., 266 F. 2d 781 (5 Cir., 1959).

[89] Wolsey v. Aetna Cas. & Sur. Co., 346 So. 2d 953 (Ala. Sup. Ct., 1977).

[90] Greene v. Wright, 365 So. 2d 551 (La. App., 1978).

[91] S.C., 1964-65, c. 52.

[92] Ibid., s. 3(1).

[93] S.C., 1974-75-76, c. 33.

[94] Ibid., s. 116. This is identical to s. 116 of the Alberta Business Corporations Act, S.A. 1981, c. B-15.

These statutes, read with the company's articles of incorporation, are a guide to identifying the "executive officers" of a business organization. However, this may not provide a complete list. What can one look to if in doubt, or if the business is not incorporated? The insuring intent is the most reliable guide. The insuring intent of "executive officer" in clause 3 was discussed in Coco v. Winston Industries Inc. et al:[95]

> This executive officer coverage is apparently designed to hold key employees. We think...important considerations...[in determining who constitutes an executive officer]... would be the value of the employee's services to the employer, the ease with which the employee would be replaced, the importance of the employee's functions to the employer and the extent to which the employee's ordinary functions tend to expose him to liability.[96]

The executive officer, through status and *de facto* function, is an integral personality in the Named Insured's operations. In many cases, the executive officer "is the business". If the business' public liability coverage did not cover liabilities incurred by the executive officer, in the course of operating the business, its public liability coverage would be meaningless.[97]

Unlike "executive officer", "director" and "stockholder" represent categories of insureds who are readily identifiable by reading the relevant sections of the Canada Corporations Act,[98] or one of the provincial company acts, whichever is applicable, with the company's incorporation documents.

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[95] 330 So. 2d 649 (La. App., 1975), reversed on other grounds, 341 So. 2d 332 (La., 1976).

[96] R. v. Andrews Weatherfoil Ltd., [1972] 1 All E.R. 65 (Eng. C.A.), dealt with the somewhat related issue of whether the criminal acts of an executive officer are the criminal acts of the company. Eveleigh, J., stated at p. 70: "It is not every "responsible agent" or "high executive" or "manager of the department" or "agent acting on behalf of a company" who can by his actions make the company criminally responsible. It is necessary to establish whether the natural person or persons in question have the status and authority which in law make their acts in the matter under consideration the acts of the company so that the natural person is to be treated as the company itself.

[97] A sample of American cases on this point are Bruce v. Travelers Ins. Co., supra, n. 88; Wolsey v. Aetna Cas. & Sur. Co., supra, n. 89; Coco v. Winston Industries Inc.et al supra, n. 95; Greene v. Wright, supra., n. 90; Wallace v. Pan American Fire & Cas. Co., 386 So. 2d 158 (La., App., 1980).

[98] Supra, n. 93.

Finally, in order for there to be coverage for liabilities incurred by these individuals, it must be determined that the liability for which coverage is sought was incurred when the executive officer, director or stockholder was "acting within the scope of...[his]...duties as such."[99]

3.4 THE REAL ESTATE MANAGER OF THE NAMED INSURED

Clause (4) indicates that any person, partnership, corporation, or other organization, is an insured while acting as a real estate manager for the Named Insured. There is an exception. Employees of the Named Insured, acting as real estate managers, are not insured. It was decided in the Louisiana case of Jackson v. East Baton Rouge Parish School Board,[100] that the real estate manager must manage the Named Insured's real estate for the benefit of the Named Insured , and not his own. Hence, the tenant of a landlord is not the landlord's real estate manager. Additionally, the word "while" indicates that coverage will only extend to liabilities arising from those activities within the scope of a real estate manager's duties.

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[99] See *Salmon on Torts*,17th ed., p. 465; *Fleming on Torts* , 5th ed., at p. 370. The leading Canadian case on point is Lockhart v. Stinson, [1941] S.C.R. 278, aff'd [1942] 2 D.L.R. 529 (P.C.).

[100] [1978] C.C.H. Fire & Casualty Cases 401 (La. App.).

3.5 WHERE THE INSURED IS A PARTNER OR A MEMBER OF AN UNDESIGNATED PARTNERSHIP OR JOINT VENTURE

Given the insuring intent of the policy as explained in Coco v. Winston Industries Inc.et. al.,[101] the concluding sentence of the "Persons Insured" clause states the obvious. As discussed in section 3.2, if the Named Insured is designated in item two of the Declarations as a partnership or joint venture, the partners or members are insured against liabilities incurred in the course of the Named Insured's business. This sentence of the "Persons Insured" clause states that if the same partners or members, are partners or members of a partnership or joint venture other than the Named Insured, they are not insured for liabilities incurred in the course of business of that partnership or joint venture. The partners or members of a partnership or joint venture, designated as the Named Insured, are insured persons for the purpose of the Named Insured's business and none other. CGL Insurance is tied to the particular business operations of a particular business organization.[102]

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[101] Supra, n. 95.

[102] For an illustration of the application of this limitation, see The Maryland Cas. Co. v. Turner, 403 F. Supp. 907 (D.C., W.D. Okla., 1975).

3.6 SEVERABILITY

It has been seen that the Named Insured, and those who fall within the Persons Insured clause, are entitled to the policy's protection. This begs the question of severability, also known as cross liability. If one insured's coverage is forfeited through his own act, is everyone's coverage forfeited?

The answer is "no." The preamble to the "Persons Insured Clause" indicates that "[e]ach of the following is an insured under this insurance to the extent set forth below." Additionally, the definition of "Insured" reads, in part, "the insurance afforded applies *separately* to each Insured against whom claim is made or suit is brought." (Emphasis added) As it was stated in Broquedis v. Employers Mut. Liab. Ins.:[103]

> ...a liability policy containing more than one insured person represents a separate obligation of the insurance company to protect and indemnify each of the insured persons. "The reason is that under the terms of the policy, reasonably construed, the obligation of the company to each assured is separable and a breach of condition or warranty by one assured does not terminate the obligation of the company to another assured." (Wenig v. Glen Falls Indem. Co., 294 N.Y.S.195...) The policy specifically provides that "[t]he insurance afforded...applies separately (emphasis supplied) to each insured..." It follows that the unilateral act of one "named insured" cannot cancel or terminate the obligation of

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[103] 360 N.Y.S. (2d) 735 (App. Div., 1974). See also Foundation of Canada Engineering Corp. Ltd. v. Canadian Indemnity, [1978] 1 S.C.R. 84, 74 D.L.R. (3d) 266, [1977] 2 W.W.R. 75, [1977] I.L.R. 440 (para. 1-832), 15 N.R. 164 (S.C.C.); aff'g [1974] 3 W.W.R. 23, 44 D.L.R. (3d) 298, 13 N.R. 282, [1974] I.L.R. 903 (para. 1-609) (Man. C.A.), at 301 (44 D.L.R. (3d)); and Dominion Bridge v. Toronto General Insurance Co. [1963] S.C.R. 362, 40 D.L.R. (2d) 840, 45 W.W.R. 125, [1963] I.L.R. 535 (para. 1-108) (S.C.C.); aff'g (1962), 37 W.W.R. 673, 32 D.L.R. (2d) 374, [1962] I.L.R. 300 (para. 1-063) (B.C. C.A.), at pp. 379-380 (32 D.L.R. (2d)).

the insurance company to the second "named insured".[104]

Presume a corporation is designated as the Named Insured. Its executive officer is responsible for a fire which destroys property owned by the corporation. The corporation is indemnified by its fire insurers. They institute and succeed in a subrogated action against the executive officer. The fire insurers execute on their judgment but the executive officer is impecunious. Can the fire insurers seek the proceeds of the CGL Policy issued to the corporation, pursuant to their statutory right of action? This "right of subrogation" is expressed as follows in the insurance acts of the common law provinces:[105]

> The insurer, upon making a payment or assuming liability therefore under a contract of insurance, is subrogated to all rights of recovery of the insured against any person, and may bring action in the name of the insured to enforce such rights.

The fire insurers could collect the policy proceeds to satisfy their judgment. The CGL Policy applies separately to each person insured. The executive officer is "...[an]...insured...legally obligated to pay...compensatory damages because of property damage caused by accident." The exclusions are analysed with respect to the interests of each person insured to the exclusion of any others protected by that policy.[106]

Another example of the application of this concept is derived from the facts of Berger v. Willowdale A.M.C.[107] In that case, the plaintiff broke her ankle when she slipped and fell on ice in her employer's parking lot. The plaintiff sued her corporate employer, its president and general manager. By reason of an order of the Workmen's Compensation Board, her action was dismissed against her corporate employer. Her action against the president and general manager was not affected by that dismissal. The court held that in certain circumstances, a corporate executive officer owed a duty to an employee to provide reasonably safe working premises. In this case, the officer was found to owe such a duty. and was found liable. If the plaintiff's corporate employer was the Named Insured under a CGL Policy, the president and general manager would be covered by that policy, assuming compliance with the coverage agreements, exclusions, conditions and endorsements.

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[104] Ibid, at p. 738. The court's comments are equally applicable to the issue of whether the default of the insured person affects the protection of another insured person.

[105] Insurance Act, R.S.A. 1980, c. I-5, s. 219; Insurance Act, R.S.B.C. 1979, c. 200, s. 224 (1); The Insurance Act, R.S.M. 1970, c. I-40, s. 146 (1); Insurance Act, R.S.N.B. 1973,c. I-12, s. 119 (2); Insurance Act, R.S.N.S. 1967, c. 148, s. 128 (1); Insurance Act, R.S.O. 1980, c. 218, s. 129; Insurance Act, R.S. P.E.I, 1974, c. I-5, s. 117; The Saskatchewan Insurance Act, R.S.S. 1978, c. S-26, s. 132.

[106] This was the analysis applied by the Supreme Court of Canada in Stolberg v. Pearl Assurance Co., 19 D.L.R. (3d) 343, [1971] I.L.R. 131 (para. 1-415)(S.C.C.); rev'g 13 D.L.R. (3d) 215, 74 W.W.R. 721 (B.C. C.A); aff'g 9 D.L.R. (3d) 195 (B.C.S.C.). In that case, the Supreme Court of Canada "read in" the concept of severability. Read strictly, the policy provisions did not allow such an interpretation. The policy covered those named in the policy "as their interests may appear".

If the CGL Policy did not apply separately to each insured, those protected under the policy would be considered as a class. If the insureds are jointly and severally liable to a third party, and one of the exclusions applied to any of the insureds, none of the insureds would be covered. On the facts of Berger,[108] the plaintiff's action against the corporation is a category of loss withdrawn from coverage by exclusion (e). This exclusion also applies to the liability of the president and general manager, and accordingly, as the loss is excluded, they would not be protected by the policy either.[109]

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[107] Unreported, January 8, 1982, Ont. H.C., Holland, J.

[108] Ibid.

[109] This was the result in Romay Automotive Ltd. v. Dominion of Canada General Ins. Co. (1974), 43 D.L.R. (3d) 346, [1974] I.L.R. 830 (para. 1-592)(Ont. H.C.).

3.7 CONCLUSION

The CGL Policy is intended to protect business organizations, be they sole proprietorships, general or limited partnerships, joint ventures, corporations, or unincorporated associations, from third party liability. It follows that key individuals within the organization are covered with respect to liabilities incurred in the course of that business' operations. It also follows that the Named Insured's employees, independent contractors, corporate parents, or subsidiaries are not insured by the policy.

The Named Insured's corporate parents and subsidiaries usually have their own CGL policies. The same is true for independent contractors working under contract with the Named Insured. Consequently, little turns on the fact that the Named Insured's CGL policy does not apply to them. The situation is just slightly different for the employees of the Named Insured.

If an employee, acting within the course and scope of his duties as an employee of the Named Insured, causes injury or damage to others, the Named Insured is vicariously liable for that injury or damage. The CGL policy covers the Named Insured's liability as this is the business' liability. However, the employee, the perpetrator of the injury or damage is jointly and severally liable together with the Named Insured. He is not insured by the Named Insured's CGL policy. It is unlikely that he would be insured under the personal liability rider of his homeowner's or tenant's policy as liability arising out of a commercial or business pursuit is usually excluded.

In practice, this presents little difficulty. Seldom does the aggrieved party, or the insurer subrogating in the name of the aggrieved party, sue the employee who causes the damage. This is because the employee is usually impecunious, or, if not, does not have the means to satisfy most judgments. If the employee is named, it is usually done out of an abundance of caution to assist in the proof of the Named Insured's vicarious liability. In that case most insurers will defend the employee, even if he is not insured under the Named Insured's CGL policy. A successful defence of the employee may result in a finding that the employee was not liable to the aggrieved party, and consequently the Named Insured is not vicariously liable for that negligence. These considerations are not usually affected by collective agreements. However, it may be the case that a collective agreement requires the employer to obtain CGL insurance that covers the employees as well as the business. In that case, the insurer would add an endorsement to the policies that amends the "Persons Insured" clause and includes the employees. Additionally, on occasion, a collective agreement will contain a clause which prevents the insurer of the employer from subrogating against the employees.

The chief source of difficulty presented by the "Persons Insured" clause is the meaning to be ascribed to "executive officer". It is unfortunate that this difficulty exists at all as it could be easily eliminated by a definition. It is likely that a court would look at the individual's status and *de facto* function, to decide if that individual is an executive officer; someone who is an integral part of the management team.

Chapter 4

The Meaning of "Legally Obligated to Pay"

Comprehensive general liability insurance is premised on the proposition that coverage will be extended to the insured who is "...legally obligated to pay compensatory damages..." because of bodily injury or property damage sustained by others. This is expressed in the CGL Policy as:

> Coverage A -- Bodily Injury
>
> To pay on behalf of the **Insured** all sums which the **Insured** shall become legally obligated to pay as compensatory damages because of **bodily injury**.
>
> Coverage B -- Property Damage
>
> To pay on behalf of the **Insured** all sums which the **Insured** shall become legally obligated to pay as compensatory damages because of **property damage** caused by accident.

Older CGL Policies referred to "...liability imposed by law..." rather than the current wording "...legally obligated to pay..." There is no material difference between them.[110] Both phrases distinguish this policy from a direct loss property policy. They indicate that the CGL insures the consequences of the insured's legal liability to others rather than the insured's property from specific perils.

There is no dispute that "liability imposed by law" and "legally obligated to pay" encompass tortious liability. However, is it the intent of the policy to cover all liability--ie. tortious, contractual and statutory liability? Canadian courts have considered this issue. The first part of this Chapter focuses on whether "...liability imposed by law..." and "...legally obligated to pay..." encompass contractual liability.

If the CGL policy covers statutory liability, does it cover the insured's liability for offences created by statutes? Should liability insurance cover this? The second part of this Chapter will consider whether this type of statutory liability is encompassed by the phrases "...liability imposed by law..." or "...legally obligated to pay..."

If the insurer denies coverage for a third party claim, and judgment is entered against the insured by consent, default, or after trial of the issues; is the insurer bound to indemnify the insured? Can the insurer demonstrate that the liability imposed upon the insured by law is outside the scope of the coverage agreements or withdrawn from coverage by an exclusion? When is it entitled to do this, if at all? If the insurer is sued by the third party pursuant to the third party action provisions of the provincial Insurance Acts,[111] does the insurer have a defence? Does not the judgment that the third party obtained against the insured constitute a liability imposed by law or a legal obligation to pay? These issues are dealt with in the third part of this Chapter. Although this discussion touches on the extensive area of the insurer's defence obligations, it is felt that any discussion of "...liability imposed by law..." or " ...legally obligated to pay..." is incomplete without it.

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[110] Long, *The Law of Liability Insurance*, Vol. 1 (1984), states that both phrases express the same thought.

[111] Insurance Act, R.S.A. 1980, c. I-5, s. 219; Insurance Act, R.S.B.C. 1979, c. 200, s 26(1); The Insurance Act, R.S.M. 1970m c. I-40, s. 127(1); Insurance Act, R.S.N.S., 1967, c. 148, s. 22(1);

4.1 WHETHER "LIABILITY IMPOSED BY LAW" OR"LEGALLY OBLIGATED TO PAY" ENCOMPASS CONTRACTUAL LIABILITY

The phrases "..liability imposed by law..." and "...legally obligated to pay...", are part of the main coverage grant of the CGL policy. As they are part of the policy that confer coverage, they must receive a broad interpretation. Nothing in the section of the policy entitled "Insuring Agreements" limits their scope. They must be interpreted to encompass all fields of legal liability--tortious, contractual and statutory liability. No Canadian court has questioned the proposition that "...liability imposed by law..." or "...legally obligated to pay..." refer to the insured's tortious and statutory liability. Unfortunately, with respect to contractual liability, these phrases have not received the treatment they deserved by Canadian courts. Confusion has arisen because the courts have looked to the exclusions to interpret this part of the coverage agreements. This is not how the CGL policy is read.[112]

Insurance Contracts Act, R.S. Nfld. 1970, c. 178, s. 13(1); Insurance Act, R.S.O. 1980, c. 218, s. 109(1); The Saskatchewan Insurance Act, R.S.S. 1978, c. S-26, s. 122(1).

[112] The method of reading a CGL policy is discussed at p. 10 and pp. 15-16.

Most CGL policies contain an exclusion similar to, if not identical with, exclusion (a) of the 1978 I.B.C. CGL policy:

> This insurance does not apply to:
>
> (a) liability assumed by the **Insured** under any contract or agreement except an **incidental contract**, but this exclusion does not apply to warranty of fitness of quality of the **Named Insured's products** or a warranty that work performed by the **Insured** will be done in a workmanlike manner.

The phrase "...liability imposed by law...", read with an exclusion similar to exclusion (a), led counsel to argue that liability assumed by contract was outside the scope of the coverage agreements. In view of this, Canadian courts concluded that the policy did not apply to liability which the insured assumes by contract. This is true, but it is important to know why it is true. It is not because "...liability imposed by law..." simply refers to tortious liability. It is because liability assumed by the insured under a contract is withdrawn from coverage because of an exclusion. If "...liability imposed by law..." simply referred to tortious liability, why would there be an exclusion for contractual liability? Why would it be necessary to limit the reach of the coverage agreement by an exclusion if the coverage agreement did not include it in the first place? The coverage agreement must encompass the risk described by the exclusion. The exclusion simply takes this risk and places it outside of the coverage grant. This point does not have many practical implications when one is dealing with the simple CGL rider. Even if the coverage agreements do encompass all liability, contractually assumed liability is withdrawn from coverage by an exclusion. However, if an endorsement is added to the policy, and the endorsement states that exclusion (a) does not apply, then it is extremely important to know the scope of the coverage and in particular, whether these phrases include contractual liability.

Courts asked to interpret these phrases have looked to the result in cases where exclusions similar to exclusion (a) have been considered together with these phrases, and concluded that "...liability imposed by law..." and "...legally obligated to pay..." do not encompass contractually assumed liability. The reasoning in these cases is wrong even if they have correctly decided that the insured's contractually assumed liability is not covered by the policy. What follows is an analysis of the leading cases that have interpreted this phrase, which hopefully demonstrates these interpretative errors.

The oldest decision is Canadian Indemnity Co. v. Andrews and George Co. Ltd.[113] In that case, the insured sold glue to a lumber company, which used it to make plywood. The glue was defective and the company brought action against the insured, arguing breach of terms implied in the contract of sale by virtue of the Sale of Goods Act.[114] The insurer denied coverage. The insured settled the third party's claim and brought action against the insurer, stating that the CGL Policy covered its contractual liability to the third party. That policy's wording, reproduced below, is integral to an understanding of the case:

> Endorsement 10
>
> 1. TO INDEMNIFY the Insured against the liability imposed by law upon the Insured for damage to or destruction of property of others caused by accident during the policy period...
>
> Endorsement 11
>
> 2. TO PAY on behalf of the Insured all sums which the Insured shall be obligated to pay by reason of *the liability imposed by law upon the Insured or by written contract* for damage to or destruction of property of others ...(Emphasis added)

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[113] [1953] 1 S.C.R. 19, [1952] 4 D.L.R. 690, [1952] I.L.R. 369 (para. 1-089) (S.C.C.); rev'g (sub. nom. Andrews & George Co. Ltd. v. Canadian Indemnity Co.) [1952] 1 D.L.R. 180, 4 W.W.R. 37, [1952] I.L.R. 247 (para. 1-056) (B.C.C.A.); rev'g [1951] 1 D.L.R. 783, [1951] I.L.R. 54 (para. 1-016) (B.C.S.C.).

[114] R.S.B.C. 1948, c. 294.

> Exclusions
>
> A. Damage to or destruction of property where the Insured has assumed a liability therefor under the terms of any contract or agreement.[115]

The Supreme Court of Canada dismissed the insured's action against the insurer. The insured's liability arose through its contract of sale with the third party, and in particular, pursuant to an implied condition imposed by the Sale of Goods Act.[116] In the Court's view, this was not "liability imposed by law" as contemplated in the policy of insurance. The coverage agreement clearly distinguished between "...liability imposed by law..." on the one hand, and on the other "liability imposed...on the Insured...by written contract". The insured voluntarily assumed the statutory liability by entering into its contract with the third party--it was not imposed. Kerwin, J., speaking for himself and Estey, J. stated:

> This endorsement was added at the same time as No. 10 and both are part of the policy. While Endorsement No. 11 contemplates an entirely different class of risk, the inclusion therein of "the liability imposed...upon the Insured...by written contract" indicates that the phrase "imposed by law" in Endorsement 10 does not include a liability imposed upon the ...[insured]...as a result of its own volition in entering into the contract with the ...[third party]...[117]

Kerwin, J., reading the policy as a whole, noted the distinction between "liability imposed by law" in Endorsement 10, and "liability imposed by written contract" in Endorsement 11, and concluded that "liability imposed by law" does not contemplate contractual liability.

Rand, J., commenting on this issue, stated:

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[115] Supra, n. 113, at p. 691-692 ([1952] 4 D.L.R.).

[116] Supra, n. 114.

[117] Supra, n. 113, at p. 692-693 ([1952] 4 D.L.R.).

> I take the phrase, liability "imposed by law" in No. 10 to mean, as distinguished from liability arising under contract. I should have done that from the context alone, but the inclusion in No. 11 of both "imposed by law...or by written contract" seems to me to put the matter beyond controversy.[118]

Rand, J.'s reasons are broader than Kerwin, J.'s but it is clear that he was considering the context of Endorsement 10 and in particular the existence of the phrase "...or by written contract..." in Endorsement 11. Cartwright, J. stated it was unnecessary to determine if "liability imposed by law" includes contractual liability because that liability, if it exists, was removed from coverage by an exclusion.

It is not appropriate to cite this case as authority for the proposition that "...liability imposed by law..." does not include contractual liability. The coverage grant in Endorsement 11 contained the words "...liability imposed by law upon the insured or by written contract..." It is clear from the context that "...liability imposed by law...", in the endorsement considered in that case, simply referred to tortious liability. The 1978 I.B.C. CGL policy, and most policies issued by the insurers who underwrite CGL insurance, do not use this wording. Consequently, there is no need to limit the meaning of "...liability imposed by law..." and "...legally obligated to pay..." to tortious liability.

Nonetheless, following the Andrews & George[119] decision, there was some question whether the phrase, "...liability imposed by law..." referred only to tortious liability. If a plaintiff sues the insured in both tort and contract for the same incident, does the allegation or proof of contractual liability remove the claim from coverage?

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[118] Ibid. at. p. 694-695.

[119] Supra, n. 113.

This was the issue in Featherstone v. Canadian General Insurance.[120] The third party, who framed his action in tort, recovered the value of property that was damaged when the insured negligently performed his contract with the third party. A term of that contract required the insured to assume responsibility for damages occurring by reason of his work. The third party's action was framed in tort, however the insured had assumed that liability under his contract. The policy excluded coverage for "any claim arising or existing by reason of the assumption of liability by contract or agreement." [121]

The Ontario Court of Appeal considered the Andrews & George[122] decision, and held that a CGL policy permits one to insure tortious liability arising out of the performance of a contract.[123] Where, as here, the insured's liability to the third party could be framed in tort or contract, the exclusion directed against liability "arising or existing by reason of "...liability or obligation assumed by the Insured under any contract or agreement,"[124] did not apply. The insured's liability did not arise solely by reason of his contract with the third party.

Could this interpretation co-exist with the analysis in Andrews & George?[125] In Dominion Bridge Co. Ltd. v. Toronto General Insurance Co.,[126] the insured contracted with the third party to construct the superstructure of the Second Narrows Bridge in Vancouver. The third party erected the concrete piers upon which the superstructure was to be placed, and it was the insured's task to erect the temporary supports or "false work". By its contract, the insured assumed all responsibility for loss or damage to any portion of the bridge structure (which would include the piers) arising out of faulty work on its part. The false work buckled due to faulty design and miscalculation, causing portions of the uncompleted superstructure to collapse upon and seriously damage the piers. The insured admitted that the accident resulted from its negligence. The insurer denied coverage. The insured brought this action against its insurer under its "Contractors' Property Damage Endorsement". The relevant parts of this endorsement read:

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[120] (1959), 18 D.L.R. (2d) 227, [1959] O.R. 274, [1959] O.W.N. 153, [1959] I.L.R. 581 (para. 1-325) (Ont. C.A.) (overruled by Dominion Bridge Co. v. Toronto General Insurance Co., infra, n. 126)

[121] Ibid, at 228 (D.L.R.).

[122] Supra, n. 113.

[123] Supra, n. 120 at p. 230 (D.L.R.).

[124] Ibid. at 230-231.

[125] Supra, n. 113.

[126] [1963] S.C.R. 362, 40 D.L.R. (2d) 840, 45 W.W.R. 125, [1963] I.L.R. 535 (para. 1-108)(S.C.C.); aff;g (1962), 32 D.L.R. (2d) 374, 37 W.W.R. 673, [1962] I.L.R. 300 (para. 1-663) (B.C. C.A.); rev'g (1961), 27 D.L.R. (2d) 486, 34 W.W.R. 289, [1961] I.L.R. 123 (para. 1-025) (B.C.S.C.T.D.).

> A. To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon the Insured by law for damages because of injury to or destruction of property, caused by accident occurring within the Policy Period and while this Endorsement is in force...
>
> This endorsement shall have no application with respect to and shall not cover any claim arising or existing by reason of any of the following matters: (1) liability or obligation assumed by the Insured under any contract or agreement;...[127]

By applying Featherstone,[128] and distinguishing Andrews & George[129] on its facts, the trial court held that the insured's concurrent contractual liability did not extinguish its tortious liability, which was covered by the policy. The insurer was required to pay the claim. All three justices of the British Columbia Court of Appeal, expressing their reasons in separate speeches, disagreed. DesBrisay, C.J., stated:

> With deference I am unable to agree with the learned Judge as to the effect of the decision of the Supreme Court of Canada, which, in my respectful opinion, decided that *where you have such an insuring clause subject to such exclusion as is here in question* and there is a happening by reason of which a liability is imposed upon the Insured by law it is not

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[127] Ibid. at p. 841-842 (40 D.L.R. (2d)).

[128] Supra, n. 120.

[129] Supra, n. 113.

> covered by the insuring clause. Furthermore, it is my view, with all respect, that *the clear intent of the insuring clause read with Exclusion (1)* is that the coverage shall not extend to indemnify the insured for a liability imposed by law for damage arising out of an accident, for which at the time it took place the insured would by contract be liable or under obligation to the person whose property is damaged.[130] (Emphasis added)

His conclusion is correct. However, he seemed to ignore the material differences between the coverage agreement in Andrews & George[131] and the one he had to consider. Nonetheless, he was correct that the intent of the insuring clause *read with exclusion (1)* is that the policy does not apply to the insured's contractually assumed liability.

Davey, J., addressed the matter as a case of pure interpretation. Unable to distinguish the Andrews & George[132] case on the narrow grounds given at trial, he stated:

> This policy is a commercial instrument which attempts to state in an understandable way what claims are excluded from the coverage. Business people are not acquainted with the subtleties of the distinction between causes of action in contract and in tort. Under the language of the policy the test is not the particular cause of action on which the claimant may recover against the insured but *whether the particular loss for which the insured is answerable--in this case the damage to the piers-- fits the terms of this Exclusion, that is to say, does the claim arise out of an obligation or liability assumed under a contract.* If it does, that is an end to the indemnity, and the fact that the claim for damages against the insured may be laid in tort as well as in contract is immaterial.[133] (Emphasis added)

Davey, J. did not address the coverage agreement. It appears that he assumed that the coverage agreement included the insured's contractually assumed liability but that very liability was excluded. Davey, J.'s comments cannot be used to interpret

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[130] Supra, n. 126 at p.377 (32 D.L.R. (2d)).

[131] Supra, n. 113,

[132] Ibid.

[133] Supra, n. 126, at p. 385 (32 D.L.R. (2d)).

"...liability imposed by law...".

Nothing in Sheppard, J.'s reasoning would indicate that he concluded that the coverage agreement only applied to tortious liability. He agreed with Davey, J., that the literal meaning of the policy is contrary to the interpretation advocated by the trial judge. The insured's tortious liability was founded upon a duty of care which existed by reason of the contractual relationship between the insured and the third party. He acknowledged that the insured's tortious liability resulted in "sums...obligated to pay by reason of the liability imposed...by law." However, that liability could also have been framed in contract:

> Under the circumstances of this case the liabilities imposed by law and assumed under contract are not distinct and separate; there is one liability, namely the damage to the piers...In effect, there is one liability only for which there are two remedies, one in tort by negligence; the other in contract, but that does not mean that these under all circumstances denote two distinct liabilities. In the circumstances of this case the liability imposed by law is also that assumed under contract.[134]

The exclusion withdrew the claim from coverage. The question in every instance is whether the liability imposed by law and the liability assumed under the contract are for one and the same loss. If that is the case, this liability is withdrawn from coverage, where there is an exclusion for that liability as there was in this case.[135]

On appeal to the Supreme Court of Canada, Mr. Justice Judson, speaking for the Court, adopted the "unanimous opinion" of the British Columbia Court of Appeal and overruled the Featherstone[136] case, as it was held to be in direct conflict with Andrews

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[134] Ibid. at p. 393.

[135] Ibid. at p. 394.

[136] Supra, n. 120.

& George.[137]

Emerging from Dominion Bridge[138] is the proposition that "liability imposed by law" includes both the insured's tortious and contractual liability; however, the exclusion for liability assumed by contract withdraws contractually assumed liability from coverage. Dominion Bridge[139] is correctly decided.

This was reinforced in Moffat Tank Co. Ltd. v. Canadian Indemnity Co. Ltd.[140] The insured supplied tanks to the third party; however, the tanks proved to be unfit for the purpose required. The third party sued the insured, but the insurer did not honour its defence obligations because it felt that the claim was not covered by the policy. The issue was whether the claim was covered and hence whether the insurer had to defend the insured. The insurer argued on the authority of Andrews & George,[141] and Dominion Bridge,[142] that the insured's liability to the third party did not fall within the phrase, "liability imposed by law", contained in the insuring agreement, which read:

> Insuring Agreement 6. Products Damage to Property of Others
>
> -- All sums resulting from the liability imposed by law upon the Insured for damage to or destruction of property of others, including the loss of use thereof...
>
> Exclusion 10
>
> (ii) Under Insuring Agreement No. 6 (a): Damage to or destruction of property where the Insured has assumed liability therefor under the terms of any contract or agreement. This exclusion shall not apply to...liability for a

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[137] Supra, n. 113

[138] Supra, n. 126.

[139] Ibid.

[140] (1973), 42 D.L.R. (3d) 260, [1974]1 W.W.R. 688, [1974] I.L.R. 870 (para. 1-680) (Alta. S.C. A.D.); aff'g [1973] 5 W.W.R. 170, [1973] I.L.R. 737 (para. 1-568) (Alta. S.C. T.D.).

[141] Supra, n. 113.

[142] Supra, n. 126.

> breach of a warranty or condition implied under the Sale of Goods Act.[143]

Johnson, J.A., with whom Sinclair, J.A., concurred, had this to say with respect to the insuring intent of "liability imposed by law":

> The wording of this policy without reference to what was said in the Andrews & George case would entitle the...[insured]...to succeed in this action. The...[insurer]...says that we are bound to apply the restricted meaning of the majority of the Court in the earlier case and deny any right of recovery to the...[insured]...This would mean that the only liability insured against in the policy is liability from tort and there is no liability at all if liability arises from contract. This would mean that the exception to exclusion No. 10 is meaningless...
>
> The meaning of the words "liability imposed by law" must be given wider interpretation than that contended for by the...[insurer]...and this can be done by giving them their ordinary meaning. We are entitled to do so for two reasons: (1)...[in]...Andrews & George...no restrictive interpretation was necessary and what was said was therefore *obiter*; and (2) the absence of the words "by written contract" where they appear in the insuring provisions of the policy together with the exception that has been added to exclusion 10 justify us in giving these words their plain and ordinary meaning.
>
> The claim that has been sued upon comes squarely within the exception to the exclusion clause and judgment thereon had been obtained in accordance with the requirements of the policy. It is therefore a liability imposed by law.[144]

Clement, J., substantially agreed with Johnson, J.A:

> I conclude that the phrase "liability imposed by law" as it stands in insuring agreement 6(a) affords indemnity against the legal liability of...[the insured]...for damages whether arising in tort or by breach of contract; and in the context of the whole policy this interpretation is reinforced by exclusion 10(ii). An exclusion presupposes a broader

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[143] Supra, n. 140 at p. 174 ([1974] 1 W.W.R.).

[144] Ibid.

> coverage from which the specified category of liability is withdrawn. If the insurer did not intend the phrase to include liability arising by contract, there was no need to have made specific provision for such exclusion. More specifically, when the liability of the insured arises by virtue of contract, but in the circumstances of the case liability may also be imposed by the common law or statute, then such liability is within the coverage of "liability imposed by law". In that case, *if the contractually assumed liability is to be excluded from coverage, special provision to that end must be made*. The point made by the Court of Appeal of British Columbia and affirmed by the Supreme Court of Canada, is that when special provision is made for the exclusion from such coverage of all liability assumed by the insured by contract, the exclusion also excludes any concurrent liability that the insured may be under in tort arising from the same circumstances.[145] (Emphasis added)

It was held that the insured's liability to the third party was a "liability imposed by law". The usual exclusion for contractually assumed liability did not apply because of an exception to that exclusion. That exception indicated that liability arising out of Sale of Goods legislation was covered. Moffat Tank[146] is correctly decided.

Dominion Bridge,[147] and Moffat[148] establish that where the phrase "liability imposed by law" appears in a coverage agreement without modification or limitation, it must be construed to include all tortious and contractual liability. These cases stated that the insurer is free to exclude either of those spheres of civil liability from coverage. They also stated that if the insured is sued in tort for a liability which it also assumed by a contract with the third party, and the policy excludes contractually assumed liability, the claim is not covered, and the insurer need not defend nor indemnify.[149]

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[145] Ibid

[146] Supra, n. 140.

[147] Supra, n. 126.

[148] Supra, n. 140.

[149] This interpretation was subsequently adopted by the Alberta Court of Queen's Bench in City of Edmonton v. Eagle Star Insurance (1980), 112 D.L.R. (3d) 492, 13 A.R. (2d) 27, [1981] I.L.R. 4991 (para. 1-1307) without mention of Moffat, supra, n. 140. In that case, the insured building contractor entered into a contract with the third party whereby it agreed to make good all injury arising in connection with the contract. The insured negligently performed his contract,and although this tortious and contractual liability was recognized as "liability imposed by law", it was excluded from coverage by reason of an exclusion for

Andrews & George[150] does not deviate from this. It considered different policy wording than that considered by the courts in Dominion Bridge[151] and Moffat Tank.[152] The 1978 I.B.C. CGL wording is virtually identical to the wording considered in the latter cases. As Andrews & George[153] considered different policy wording, that case does not apply to the 1978 I.B.C. CGL wording.

A recent case, Acklands Ltd. v. The Canadian Indemnity Co.,[154] deviates from this reasoning. The Manitoba Court of Appeal was asked to construe a personal injury endorsement to a CGL policy to determine if the insured was covered for a wrongful dismissal claim brought against it. The coverage agreement read as follows:

> To pay on behalf of the insured all sums which the Insured shall become obligated to pay by reason of the liability imposed by law upon the Insured or assumed by the Insured under contract or agreement for damages

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liability assumed by agreement. The Dominion Bridge case, supra, n. 126, was cited as authority for this conclusion.

In Harbour Machine Ltd. v. Guardian Ins. Co. of Canada (1985), 60 B.C.L.R. 360, 10 C.C.L.I. 72 (B.C. C.A.), the court stated that cases which state that liability assumed by contract is not liability imposed by law may well be distinguishable as the policies considered in those cases expressly excluded contractual liability.

In Cansulex Limited v. Reed Stenhouse et al (1986), 70 B.C.L.R. 273, 18 C.C.L.I. 24 [1986] I.L.R. 8051 (para. 1-2090) (B.C. S.C. T.D.), the court held that a broad Coverage Agreement... "...to pay all sums which the insured shall become legally obligated to pay as damages for property damage caused by accident protects the insured from all claimants. For underwriting purposes insurers have excluded liability assumed by contract." (p. 8056 I.L.R.).

Central Trust Company v. Rafuse and Gordon, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481 (S.C.C.), held that there is concurrent liability in tort and contract. Where a contract creates a relationship of proximity upon which a common law duty of care may exist, the contracting parties may be sued in contract and in tort if by their negligence they breach that contract, as long as the common law duty of care does not depend upon the precise wording of the contract Even though the claim may be framed in tort and contract, and the insured is sued in tort, the question is whether the insured's liability is also liability assumed by contract. If it is, then that liability is excluded. This is discussed in greater detail in Chapter 7 at pp. 175-184.

[150] Supra, n. 113.

[151] Supra, n. 126.

[152] Supra, n. 140.

[153] Supra, n. 113.

[154] [1985] 4 W.W.R. 71, 16 D.L.R. (4th) 95, [1985] I.L.R. 7344 (para. 1-1906), 8 C.C.L.I. 163 (Man. C.A.); aff'g (1984), 29 Man. R. (2d) 203, [1984] 4 W.W.R. 764, 16 D.L.R. (4th) 637, 6 C.C.L.I. 209 (Man. Q.B.).

> including...(a)...wrongful dismissal...[155]

This wording is almost identical to that considered in Andrews & George.[156] The Court affirmed the trial court's holding that "liability imposed by law" refers only to tortious liability. Andrews & George[157] was cited for that proposition. Further, the additional phrase "or assumed by the Insured under contract or agreement" was held to refer to tortious liability borne by another which the insured agrees to assume under its contract with that person.

This decision comes to the right result but it did not have to make the finding it did as to the content of the coverage agreement to arrive at that conclusion. It ignores Dominion Bridge[158] and Moffat.[159] It also ignores the fact that contractually assumed liability was excluded in Andrews & George,[160] resulting in the finding in that case that "liability imposed by law" simply refers to tortious liability. There is no justification for giving this coverage agreement such a restrictive interpretation. The Court was concerned, and rightfully so, that it would be sanctioning coverage for an intentional breach of contract.[161] Nonetheless, there was no justification in limiting the coverage agreement in that fashion.

Unfortunately, reasoning similar to Acklands[162] was repeated by the courts in Ben's Limited v. Royal Ins. Co. Ltd.,[163] and in Capitol Regional District v. General

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[155] Ibid. at p. 7345 (I.L.R.).

[156] Supra, n. 113.

[157] Supra, n. 113.

[158] Supra, n. 126.

[159] Supra, n. 140.

[160] Supra, n. 113.

[161] The court stated that one of the fundamental concepts of liability insurance as it has developed in Canada is that there should be no coverage for the consequences of intentional acts. Supra, n. 154, at p. 7346 I.L.R.

[162] Supra, n. 154.

[163] (1985), 68 N.S.R. (2d) 379, 159 A.P.R. 379, [1985] I.L.R. 7571 (para. 1-969) (N.S. S.C. T.D.).

Accident Assurance Co. of Canada.[164] Without citing any authority, the court in Graham et al v. Raposo; Gilbralter Gen. Ins. Co. (Third Party),[165] came to the same conclusion in construing a homeowner's policy. In the later decision, the coverage agreement stated "...we will pay all sums which you become legally liable to pay..." and "legal liability" was defined as "...responsibility which the courts recognize and enforce between persons who sue one another..." Liability assumed by contract was not excluded. Without citing authority the court stated that the policy only covered the insured's tortious liability. This conclusion is incorrect. "...Liability imposed by law..." and "...legally obligated to pay...", which is part and parcel of a coverage agreement must be given a broad interpretation. The fact that a CGL policy contains an exclusion which withdraws contractual liability from coverage is no basis for saying that the coverage agreement simply refers to the insured's tortious and statutory liability.[166]

4.2 WHETHER "LIABILITY IMPOSED BY LAW" AND "LEGALLY OBLIGATED TO PAY" INCLUDE THE INSURED'S LIABILITY FOR STATUTORY OFFENCES

There is no doubt that statutory liability is encompassed by the phrases "...liability imposed by law..." and "...legally obligated to pay...". However, all levels of government pass regulatory legislation that requires citizens, be they corporations or individuals, to do or refrain from doing certain acts. Disobedience of the legislation usually results in an offence which in turn results in a prosecution. Even though the policy covers the insured's statutory liability, should there be insurance coverage for this type of thing? Aren't these offences intended to prohibit conduct deemed by the legislatures to be contrary to the public good? If the insured does not suffer some direct monetary harm, would not the intent of these statutes be subverted? Is this not the purpose behind the Uniform Rule of Public Policy[167] found in the Insurance Acts of the common law provinces?

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[164] (1987), 15 B.C.L.R. (2d) 224, 39 D.L.R. (4th) 619, [1987] I.L.R. 8549 (para. 1-2210) (B.C. C.A.) aff'g 15 C.C.L.I. 193, [1986] C.C.L. 5102 (B.C. S.C.).

[165] [1987] I.L.R. 8528 (para. 1-2202) (Ont. D.C.).

[166] Cansulex Limited v. Reed Stenhouse et al, supra, n. 149.

The answers to these questions lie in an analysis of the type of offences considered. If proof of the offence does not require proof that the insured deliberately committed the offence, and if the penalty imposed for committing the type of offence is an attempt by the province or federal government to collect compensation for the harm inflicted by the insured, there is no public policy objection to prohibit coverage. The policy should apply.

(a) The Element of Wilfulness

Statutes that protect the environment or wildlife are the most common sources of these offences. This type of offence is not a criminal offence in the true sense but are called "public welfare offences". The Supreme Court of Canada, in a landmark decision,[168] held that this type of offence does not require proof of a mental element; simply proof of the act. In these cases the person charged can defend his conduct and escape further liability on the grounds that reasonable care was taken to abide by the statute.

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[167] The Uniform Rule reads as follows:

> "Unless the contract otherwise provides, a violation of any criminal or other law in force in the province or elsewhere does not, *ipso facto*, render unenforceable a claim for indemnity under a contract for insurance except where the contravention is committed by the insured, or by another person with the consent of the insured with intent to bring about the loss or damage."

Insurance Act, R.S.A. 1980, c. I-5, s. 135; Insurance Act, R.S.B.C. 1979, c. 200, s. 101; Insurance Act, R.S.N.B. 1973, C. I-12, s. 2; The Insurance Contracts Act, R.S.Nfld. 1970, c. 178, s. 18; Insurance Act, R.S.N.S. 1967, c. 148, s. 8(2); The Insurance Act, R.S.O. 1980, c. 218, s. 95; Insurance Act, R.S.P.E.I. 1974, C. I-5, S. 106; The Saskatchewan Insurance Act, R.S.S. 1978, c. S-26, s. 121.

An example of the type of liability referred to is a series of offences created by the Forest Act[169] of British Columbia. Section 120 of the Act states that anyone who sees an unattended, open fire burning within a kilometre of a forest shall report the fire to the police or a forestry officer without delay. Section 121 states that anyone, such as a contractor, for example, who occupies an area within which a fire originates, must use his best efforts to control and extinguish the fire including using all available manpower and equipment. Section 161 of the Act provides that contravention of sections 120 or 121 is an offence and a person found liable must pay the Crown the value of the timber or of other Crown property destroyed as well as the costs of suppressing the fire. There is no requirement to prove deliberate breach of the statute. Does the CGL policy apply to the insured's liability under this Act? The answer lies with a similar case out of North Carolina.

In North Carolina an insured faced prosecution by the state under environmental legislation for reimbursement of costs arising out of ground water contamination.[170] The CGL insurers declined to defend the insured. The Court held that the insurers must honour their defence obligations as the Federal complaint simply alleged that the insured contributed to the damage. This gave rise to the potential that the insured acted negligently and that any resulting damage was the result of an accident as opposed to a deliberate act. One must conclude that until there is a specific finding that the insured acted wilfully, the insurers must defend their insured.

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[168] R. v. Sault Ste. Marie (1978), 85 D.L.R. (3d) 161 (S.C.C.).

[169] R.S.B.C. 1979, c. 140.

[170] Waste Management of Carolinas Inc. v. Peerless Insurance Company, 323 S.E. 2d 726 (N.C. C.A., 1984).

(b) The Nature of the Fine

The nature of the pecuniary sanction consequent upon proof that the statute was violated also determines whether the policy will apply. Both Coverage Agreement A and B state:

> "To pay on behalf of the **Insured** all sums which the **Insured** shall become legally obligated to pay as compensatory damages..."

The insured must be liable to pay "compensatory damages" before the policy applies. As to the meaning of "compensatory damages", one commentator stated:

> ..It does not include a legal obligation to to pay a civil or criminal penalty. It does not include the cost of complying with a mandatory injunction. It is not meant to include the cost to the insured or preventing or avoiding future loss.[171]

The question in each case when dealing with this type of offence is to ask whether the pecuniary sanction is intended as punishment for intentional wrongdoing. In Brown v. Allweather Mechanical Grouting Co. Ltd.[172] the Court stated:

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[171] Tinker, George, H. *Comprehensive General Liability Insurance–Perspective and Overview*, (1975) 25:3 Federation of Insurance Cousel. Quarterly,, 217, at 254.

[172] [1953] 1 All. E.R. 474 (Q.B.) at p. 476. *Halsbury's Laws of England*, (4 ed.) Vol. 11(2) states: "...where an act is commanded or prohibited by statute, disobedience is *prima facie* criminal unless criminal proceedings manifestly appear to be excluded by statute. An act may be prohibited or commanded by a statute in such a manner that the person contravening is liable to a pecuniary penalty which is recoverable as a civil debt; in such an instance, contravention is not a crime...Whether or not a statute creates a criminal offence is a question of interpretation; e.g. if the word "penalty as distinct from the word "fine" is used, the general rule is that the penalty must be recovered as a debt in civil court...the word "offence" is sometimes used to describe a criminal act...and sometimes used to describe an act that is not criminal...there is a rule of construction that a man is not to be put to his peril on an ambiguity."

> I do not think that the mere fact that the word "offence" is used there shows that it is to be regarded as a criminal offence. A failure to do something prescribed by statute may be described as an offence although Parliament imposes in respect of it, not a criminal sanction, but a mere pecuniary sanction which is recoverable as a civil debt....of course if the penalties are not paid, there may be proceedings under the Debtors Acts...and there may be committal to prison, but that is not punishment for the offence itself. It is punishment for not paying the penalty, or a means of endeavouring to compel the defendant to pay the penalty which is a different matter.

If the pecuniary sanction is in the nature of a penalty, the policy would not apply as the penalty could not be considered "compensatory damages". If the sanction is not in the form of a penalty, but more of an order for compensation, then the policy should apply. For example, the Forest Act[173] creates a pecuniary sanction that is recoverable as a civil debt. But the Crown's demand for compensation is strikingly similar to tort damages in that it simply wishes to be placed in the position it would have been in had the statute been obeyed. This type of payment is of different character than a fine that is levied as punishment in a criminal case. It must be considered "compensatory damages".

A Michigan corporation was prosecuted by the Attorney General of Michigan under a statute similar in terms to the Forest Act[174] for its failure to clean up subterranean and percolating water contaminated as a result of a fire for which it was responsible.[175] The company's CGL insurers denied coverage but the Michigan Court of Appeals held that the liability was covered as there was no substantive difference between this type of prosecution and a law suit by the state against the company to recover traditional "damages" that would be clearly covered by the CGL policy.

Assuming that one can demonstrate that the pecuniary sanction levied is

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[173] Supra, n. 169.

[174] Ibid.

[175] United States Aviex Co. v. Travellers Insurance Co., 336 N.W. 2d 838 (Mich. App., 1983).

"compensatory damages" does this type of payment result in a "..pay[ment] on behalf of the insured..."? Does this not require payment to an injured or aggrieved third party rather than a government body? .The answer is "no". In Northwood Mills Ltd. et al v. The Continental Insurance Co.,[176] it was argued that a CGL policy does not respond to the type of direct statutory liability contemplated by this Act. The court rejected this argument holding that the words are equally consistent with reimbursement to the insured of unusual expenses incurred by it in the course of business. Surely this must be correct.

The words "liability imposed by law" and "legally obligated to pay" are very broad. There is no indication of an intent to limit coverage to tort or contractual liability. Even if the insured is charged with an offence contrary to a statute, CGL insurers must defend and indemnify the insured unless the nature of the the prosecution is such that the Crown must prove specific intent on the part of the insured to contravene the interests protected by the statute, and the sanction imposed is a penalty rather than compensation.

4.3 "LEGALLY OBLIGATED TO PAY" AND THE DEFENCE AGREEMENT

Consider the following scenario: A plaintiff sues an insured who holds a

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[176] [1973] I.L.R. 646 (para. 1-543) (B.C. S.C. T.D.). For a similar case, see Westwood Timber Brokers Ltd. v. The Canadian Indemnity Co., [1985] I.L.R. 7430 (para. 1-1936) (B.C. C.A.). In Hildon Hotel (1963) Ltd. v. Dominion Insurance Corp. Ltd. (1968), 66 W.W.R. 289, 1 D.L.R. (3d) 214, [1969] I.L.R. 627 (para. 1-680) (B.C. S.C. T.D.), the insured was obliged to pay a sum of money to the Harbours Board pursuant to a by-law under the then existing National Harbours Board Act for clean-up expense it incurred when oil escaped from the insured's property and coated wharves owned by others. In that case the damage was held to fall within the coverage agreement even though the party to whom the insured was liable did not own the property that was damaged.

CGL policy. The insurer declines to defend its insured. The insured does not defend either. The plaintiff enters default judgment. Subsequently, the plaintiff or the insured sues the insurer for wrongful denial of coverage. In such a situation, is the insurer precluded from arguing that, despite the existence of a judgment, and hence, "liability imposed by law", the facts do not establish the insured's liability to the third party, or if they do, that the policy excludes such a claim from coverage? This issue is relevant to all liability policies, not just the CGL.

This issue was discussed by the Supreme Court of Canada in Global General Insurance Co. v. Findlay.[177] Briefly, the insurer issued a standard auto policy to the named insured for a period of one year. The named insured died during the policy period. The named insured's executrix gave an individual named Layng consent to drive the insured vehicle. Layng, the unnamed insured, was involved in a collision with the third party.

The third party sued Layng, and the executrix. The insurer denied coverage. The third party received judgment. Subsequently, the third party sought recovery from the insurer pursuant to the absolute liability provisions of the auto portion of the Ontario Insurance Act.[178] Additionally, Layng commenced an action against the insurer, alleging that coverage had been wrongfully denied, and sought recovery of the expenses he incurred in contesting the first action. Both of these actions were argued together before the Supreme Court of Canada.

Cartwright, J., speaking for the Court, stated:

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[177] [1961] S.C.R. 539, 28 D.L.R. (2d) 654, (S.C.C.), on appeal from the Ontario Court of Appeal.

[178] R.S.O. 1950, c. 183, s. 214(1).

> ...The judgment...was a final judgment pronounced by a Court of competent jurisdiction and constituted conclusive evidence against all the world of its existence, date and legal consequences...The legal consequence of that judgment was to impose upon...[the named insured's executrix]...in her capacity as executrix a liability arising from the ownership of the automobile described in the policy. That liability was clearly one imposed by law and fell within the terms of the insuring agreements...I can find no support for the...[insurer's]...submission that it was necessary for the ...[third party]... to prove again in the action against the insurer under s. 214(1) the facts on which the...[trial judgment]...was founded. To so hold would be to disregard the maxim, *interest reipublicae ut sit finis litium.* [179]

The insurer is precluded from defending on the grounds that the insured is not liable to the third party. However, Cartwright, J., went on to state:

> ...In the case at bar no attempt was made either in the...[insurer's]... pleadings or in the evidence to impeach any of the findings made in the action of...[the third party against the unnamed insured and the named insured's executrix]...except the finding that at the time of the accident the insured automobile was owned by...[the named insured's executrix]...It has already been pointed out that the Learned trial Judge heard evidence on that point and decided it adversely to the ...[insurer] ...and that this finding is not now questioned. This, in my opinion, is sufficient to dispose of the ground of appeal with which I am now dealing.
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> However, I wish to rest my judgment on this point also on the view of the learned trial Judge was right in his conclusion that in the circumstances of this case the fact that at the time of the accident the insured automobile was owned by...[the named insured's executrix]...was sufficiently established by proof of the...[trial judgment]..., the record of the action...and the reasons of ...[the trial judge]...and that it was unnecessary for counsel for the ...[third

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[179] Supra, n. 177, at p. 663 (D.L.R.). The English translation of the maxim referred to is, "it is in the interest of the state that there shall be an end of litigation". *Couch on Insurance*, (2nd ed.), para. 74:818, expresses this point as follows: "One who has under-taken to indemnify against loss arising out of a certain claim and has notice and opportunity to defend an action brought upon such a claim is bound by the judgment entered in such action, and is not entitled, in an action against him for breach of his agreement to indemnify, to secure a re-trial of the material facts which have been established by the judgment against the person indemnified...This concept of binding the liability insurer by the judgment against the insured is not an application of the principle of *res judicata :* but it is better termed estoppel by judgment...The principle on which the liability insurer is bound by the facts necessarily involved in the action by the injured claimant against the insured has also been described as the principle of collateral estoppel, and it has been held that although the rule of *res judicata* was not applicable, the insurer was nevertheless bound.

> party]...to call the further evidence which as a matter of precaution they did call.[180]

The Global[181] decision stands for the proposition that the insured will establish a *prima facie* case for indemnity under the policy where it proves: (1) that it has been found liable to the third party (by introducing the judgment and the record in the action); and (2) that the trial judge heard evidence and decided those issues necessary to trigger coverage. On all other points, the insurer is bound by the judgment,[182] unless it can successfully argue that the court erred in findings of fact that resulted in coverage or that fresh evidence is available to show that there is insufficient evidence to establish coverage.

There are several examples of this principle amongst the decided cases. In Western Pile and Foundation (Ontario) Ltd. v. Canadian General Insurance Co.,[183] the insured, a sub-contractor, was excavating in the area of a coffer-dam. The wall of the coffer-dam gave away causing substantial damage as large quantities of sand, soil, and water to extrude into the coffer. The incident gave rise to an action against the insured by the general contractor which the insurer declined to defend on the grounds, amongst others, that the loss was not caused by accident within the meaning of the insured's CGL Policy. Judgment was entered against the insured following a contested trial. In this action, the court held that as the insurer did not contest the facts which established that the loss was caused by accident, by the introduction of fresh evidence or otherwise, the judgment obtained by the plaintiff against the insured was conclusive of the insurer's obligation to defend and indemnify the insured. The Court cautioned that the insurer is best advised to have itself joined in the plaintiff's action against the insured in order to argue the facts which trigger coverage, rather than waiting for the plaintiff or the insured to take action against it.[184]

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[180] Ibid, at p. 664-665.

[181] Supra, n. 177.

[182] This point was accepted in Canadian Equipment Sales & Service Ltd. v. Continental Ins. Co. (1974), 50 D.L.R. (3d) 30, 5 O.R. (2d) 220, (Ont. H.C.).

[183] (1970), 12 D.L.R. (3d) 552, [1970] O.R. 172, [1970] I.L.R. 962 (para. 1-337) (Ont. C.A.); reversed on other grounds, [1972] S.C.R. 175, 20 D.L.R. 325, [1971] I.L.R. 170 (para. 1-429) (S.C.C.).

In Pickford & Black Ltd. v. Canadian General Insurance,[185] the insured was entitled to indemnity under the CGL Policy if it could prove that the plaintiff's property damage, for which it was found liable, following trial of the issues,[186] occurred within the policy territory, and that it was caused solely and directly from an accident due to the operations of the insured. The insured's negligent act produced the third party's damage at a later date. The insurer's liability to the insured was therefore contingent on a finding of whether, as a matter of law, an "accident" occurs when the causative act is complete or when the damage occurs, and on the finding of whether as a question of fact the damage was caused by an "accident" within the meaning of the policy. The insurer defended the insured's action for indemnity on several grounds, one of which being that the third party's damage was not attributable to any act or omission on the part of the insured. The trial judge admitted evidence as to the cause of the damage to the third party's property, for "[t]he question as to what caused the damage is one of the matters to be determined by me."[187] Evidence on this point was correctly admitted as it was probative of whether the insurer was correct to deny coverage.

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[184] (1970), 12 D.L.R. (3d) 552, [1970] O.R. 172, [1970] I.L.R. 962 (para. 1-337) (Ont. C.A.); reversed on other grounds, [1972] S.C.R. 175, 20 D.L.R. 325, [1971] I.L.R. 170 (para. 1-429) (S.C.C.).

[185] [1977] 1 S.C.R. 261, 64 D.L.R. (3d) 179, 14 N.S.R. (2d) 181, [1976] I.L.R. 81 (para. 1-732) (S.C.C); aff'g (1974), 53 D.L.R. (3d) 277, 10 N.S.R. (2d) 517, [1976] I.L.R. 33 (para. 1-720) (N.S. C.A.); rev'g (1973), 42 D.L.R. (3d) 360, 10 N.S.R. (2d) 517, [1974] I.L.R. 907 (para. 1-610) (N.S. S.C. T.D.).

[186] [1977] 1 S.C.R. 261, 64 D.L.R. (3d) 179, 14 N.S.R. (2d) 181, [1976] I.L.R. 81 (para. 1-732) (S.C.C); aff'g (1974), 53 D.L.R. (3d) 277, 10 N.S.R. (2d) 517, [1976] I.L.R. 33 (para. 1-720) (N.S. C.A.); rev'g (1973), 42 D.L.R. (3d) 360, 10 N.S.R. (2d) 517, [1974] I.L.R. 907 (para. 1-610) (N.S. S.C. T.D.).

[187] Supra, n. 185, at p. 373 (42 D.L.R. (3d)). The Court of Appeal declined to rule as to whether the trial judge was correct in admitting this evidence: supra, n. 185 at p. 279 (53 D.L.R. (3d)). This point was not mentioned by the Supreme Court of Canada.

In Chemetics International Ltd. v. Commercial Union Assurance Co. of Canada,[188] the insured designed and built an oxygen bleach plant in Virginia, for an American company. Two years after the plant's completion, the roof on the tower cracked. An action was filed against the insured in Virginia. The insurer refused to defend on the basis that the claim was excluded by an exclusion, similar to exclusion (j) of the standard form CGL Policy. The insured defended the action but judgment was entered against it. It then brought this action in British Columbia for indemnity under the policy. The British Columbia Supreme Court held that the finding of liability against the insured was erroneous, but the Virginia judgment was conclusive nonetheless. That liability did not have to be proven again in the second action. The Virginia judgment brought the insured within the insuring agreement. The insurer did not contest this, and hence the court had no cause to impeach the insured's *prima facie* case for indemnity.

If the insured is liable to the plaintiff pursuant to an event which its insurer maintains is not covered by the policy; must the insured force the plaintiff to obtain judgment against it before the insured sues the insurer for wrongful denial of coverage? Stated another way, if the insured settles with the plaintiff and a judgment is not entered against the insured, can the insurer deny coverage on the ground that the insured was not "...legally obligated to pay..."?

The British Columbia Supreme Court in Shore Boat Builders Ltd. v. Canadian Indemnity Co.[189] answered this question with an emphatic "no". In that case the insured settled its obvious liability to the plaintiff, following its insurer's coverage denial. The insured sued the insurer. The insurer argued that the insured made a voluntary settlement with the third party which was not "liability imposed by law". The Court held that as the insured was clearly liable to the third party, "as judgment after actual trial would have entailed needless expense",[190] and as the insured's settlement was reasonable in the circumstances, the insurer was not permitted to argue that the insured's liability was not "liability imposed by law".[191]

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[188] (1982), 31 B.C.L.R. 273, [1981] 6 W.W.R. 614, [1981] I.L.R. 5524 (para. 1-1451) (B.C. S.C. T.D.). See also, Wright Engineers Limited v. United States Fire Ins. Co. et al (1983), 48 B.C.L.R. 371 (B.C. S.C. T.D.)

[189] (1982), 31 B.C.L.R. 273, [1981] 6 W.W.R. 614, [1981] I.L.R. 5524 (para. 1-1451) (B.C. S.C. T.D.). See also, Wright Engineers Limited v. United States Fire Ins. Co. et al (1983), 48 B.C.L.R. 371 (B.C. S.C. T.D.)

In Shore Boat Builders[192] the court stated that the insured was clearly liable to the third party and decided accordingly. Would the matter be different if the insured felt that it was not liable to the plaintiff but because of the economics of the matter, settled with the plaintiff? In Cansulex Limited v. Reed Stenhouse et al.[193] the Court stated:

> In my view an insured in the position of Cansulex is entitled to settle any insured claim brought against it on any reasonable basis and for any reasonable amount, and to recover such amount from its insurers not necessarily as indemnity, as such may be payable in discharge of a liability which may not have existed, but as damages for breach of contract. In this connection it is my view that an insured who has been abandoned by its insurer is entitled to buy peace at a reasonable price even though he denies his liability. The fact that he pays the claimant $'X', and pays his solicitors, $'Y', does not make the two payments intrinsically different...These amounts, if reasonable, are payments which the insurers might themselves have paid if they had not wrongfully repudiated their liability to the insured, and they cannot insist as a condition of indemnity or reimbursement that the insured stubbornly maintain a denial of liability all the way to judgment in order to obtain protection of the policies which has been wrongfully denied.

The proposition therefore emerges that in an action for breach of the policy, the insurer is precluded from challenging the findings of fact establishing the insured's liability to the plaintiff but is permitted to contest those facts determining the insurer's liability to the insured under the policy.[194] If the insured is responsible for the plaintiff's damage; the insurer denies coverage for that liability; the insured makes a reasonable settlement with the plaintiff; or there is a slim chance that the insured is liable and reasonably settles that liability; the insured sues the insurer for wrongful denial of coverage; then the insurer is precluded from arguing that the insured's liability to the third party was not imposed by law or that it did not have a legal obligation to pay.

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[190] Ibid, at p. 631-632 (D.L.R.).

[191] See also, Reliance Petroleum Limited v. Stevenson; Reliance Petroleum Limited v. Canadian General Insurance Co., [1953] O.R. 807, rev'd on other grounds, [1954] 4 D.L.R. 730, [1954] O.R. 846 (Ont. C.A.); aff'd [1956] S.C.R. 936, 5 D.L.R. (2d) 673; Wright Engineers Limited v. United States Fire Ins. Co. et al, supra, n. 189.

[192] Supra, n. 188.

[193] Supra, n. 149, at p. 8072 (I.L.R.).

4.4 CONCLUSION

The phrase "legally obligated to pay" distinguishes this policy from a direct loss, property policy. It indicates that the policy responds to the insured's liabilities, and does not provide an indemnity for loss of property owned by the insured. The words are intended to encompass all spheres of the insured's potential liability--tortious, contractual, and statutory.[195]

Judicial treatment of the phrase indicates a lack of understanding as to how insurance policies are to be interpreted. As the phrase is found in a coverage agreement, it must be given a broad interpretation, in favour of the insured. There is no indication in the words used that it is to be limited to tortious liability. Additionally, the words used in the phrase must be given ordinary definitions. As business people are not acquainted with the subtleties of pleadings and legal definitions of causes of action, there is even more reason to hold that the phrase encompasses all spheres of the insured's civil liability.[196] Recently, some courts have ignored these rules. They cite a decision of the Supreme Court of Canada, Andrews & George,[197] as authority for the proposition that "legally obligated to pay" does not include contractually assumed liability. This is not what this decision says. The result in that case was that the insured's contractually assumed liability was not covered, but that was because the coverage agreement modified the phrase "...liability imposed by law..." and there was an express exclusion in the policy considered that withdrew contractually assumed liability from coverage. There is no justification for concluding that "legally obligated to pay" does not encompass contractual liability. Indeed, the phrase is broad enough to include the insured's liability under certain type of statutes that create public welfare offences.

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[194] In Bettinger v. Northwestern Nat. Cas. Co., 213 F. 2d 200 (C.A. 8th Cir., 1954), the court stated: "...where a liability insurer disclaims liability and refuses to defend its assured, a judgment against the assured does not preclude the insurer from having its day in court on the issue of its liability to the assured under his policy, and that it is only the insurer with full knowledge of the facts, who unqualifiedly assumes and conducts the defense of an action against its assured that is estopped by a judgment against him...[from asserting non-liability to the assured]..."

[195] Dominion Bridge Co. Ltd. v. Toronto General Ins. Co., supra, n. 126; Moffat Tank Co. Ltd. v. Canadian Indemnity Co. Ltd., supra, n. 140; Cansulex Limited v. Reed Stenhouse et al, supra, n. 149.

"Legally obligated to pay" is not to be interpreted as an implied condition that a court must determine that the insured is liable to the injured party before the policy responds. Such a result would mean that the defence obligations in the policy are meaningless and result in needless litigation. In all cases the insurer would wait to determine if a court considered the insured liable to pay the plaintiff, rather than defending it as it is required to do, if the claim falls within the terms of the policy. If coverage is denied, judgment is entered against the insured, and the insured or the injured third party contests the coverage denial, the insurer may defend its position by litigating those facts that trigger coverage. For example, the insurer could show that the type of damage to property sustained by the injured party is not "property damage" as defined in the policy. The fact that judgment has been entered against the insured, and hence the insured has a legal obligation to pay the injured party's claim, does not forestall such a defence.

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[196] See the comments of Davey, J., in Dominion Bridge Co. Ltd. v. Toronto General Ins. Co., supra, n. 126, at p. 385 (32 D.L.R. (2d)).

[197] Supra, n. 113.

Chapter 5

Bodily Injury and Property Damage

The definitions of "bodily injury" and "property damage" read with "Coverage Agreement A--Bodily Injury," and "Coverage Agreement B--Property Damage" are the keys to understanding the protection afforded by the CGL policy. The insuring intent of "bodily injury" is clearly expressed, and the courts have little quarrel with it. In contrast, the current definition of property damage is the product of 30 years of debate as the courts have continuously disagreed with the insurance industry as to its scope. This chapter is divided into two sections: Section 5.1 looks at the definition of "bodily injury"; section 5.2 looks at the definition of "property damage".

5.1 COVERAGE FOR "BODILY INJURY".

Coverage Agreement A, reads as follows:

> Coverage Agreement A--Bodily injury
> To pay on behalf of the **insured** all sums which the insured shall become legally obligated to pay as compensatory damages because of **bodily injury**.

"Insured" and "bodily injury" are defined in the definition section of the policy shell. "Insured" was discussed in Chapter 3. "Bodily injury" is defined as follows:

> "bodily injury" means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom.

The salient feature about this coverage agreement is that coverage for bodily injury is not predicated on the occurrence of an accident--a sudden and fortuitous event.[198] The coverage agreement would therefore encompass the insured's liability for intentionally inflicted injuries. However, exclusion (g) removes this liability from coverage, as it excludes "**bodily injury** caused intentionally by or at the direction of the insured."[199] Additionally, as there is no mention of "accident" in the coverage agreement, it is wide enough to encompass coverage for long term exposure diseases.

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[198] "Accident" is discussed in Chapter 6.

[199] As to when intentional bodily injury is committed by the insured, see Co-operative Fire & Cas. Co. v. Saindon, [1976] S.C.R. 735, 4 N.R. 343, 56 D.L.R. (3d) 556, 10 N.B.R. (2d) 329, 4 A.P.R. 329, [1975] I.L.R. 1152 (para. 1-669) (S.C.C.). As to when bodily injury is caused "at the direction of the insured" see Seligham v. Fireman's Fund Ins. Co., [1963] 2 O.R. 614, 40 D.L.R. (2d) 554, [1963] I.L.R. 2045 (para. 5-110) (Ont. H.C.).

(a) Coverage for Long Term Exposure Disease

American workers suffering from diseases such as asbestoses, mesothelioma, and lung cancer, have sued manufacturers and suppliers of asbestos fibres or products as well as companies that mine asbestos on the basis that they were not warned that asbestos was a dangerous product, capable of causing this type of disease. Although asbestos related diseases occurring in Canada are more often than not under the purview of the provincial Worker's Compensation Boards, the issues raised by the American lawsuits have serious implications in Canada. To what extent is the insured covered for diseases contracted through long term exposure to pollutants or products manufactured or sold by the insured?

The CGL insurers of the manufacturers and suppliers of asbestos have often denied coverage for liability flowing from these actions as they allege that the disease or bodily injury did not occur during the currency of their particular policy. As these diseases have a long latency period, bodily injury may occur during the currency of several policies. In order to decide who must defend and indemnify, it must be determined when the disease "occurs". Two theories have been advanced.[200]

The first theory is called the "manifestation" theory. Bodily injury does not occur until the disease is diagnosed. Those CGL insurers whose policies were subsisting as of the date the disease manifests itself must defend and indemnify. The second theory is called the "exposure" theory. Bodily injury is deemed to have occurred upon the inhalation of the first asbestos fibre. As a result, all of the CGL insurers whose policies covered the period of time in which the workers were exposed to the asbestos, have a joint and several obligation to indemnify.

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[200] Several articles have been published that deal with this issue: McGuiness, "*Duty to Defend and Indemnify* (1981), 26 Vill. L. Rev. 1080; "*Liability Insurance for Insidious Disease*" (1980), 48 Fordham L. Rev. 657; Oshinsky, "*CGLP: Trigger and Scope of Long Term Exposure Cases* "(1982) 17 Forum 1035; Ingram, "*Insurance Coverage Problems in Latent Disease and Injury Cases* "(1982) 12 Environ. L. 317; "*Aggregation of Claims: Liability for Certain Illnesses with Long Latency Periods Before Manifestation*" (1981), 16 Forum 636; "*Asbestoses: who will pay the plaintiff?*" (1983), 57 Tul. L. Rev. 1491; "*Liability cure-all for insidious disease claims*" (1983), 11 Pepperdine L. Rev. 125. What follows is a brief summary of the issues developed at length in these articles.

The exposure theory is attractive. It spreads the loss throughout the industry and is fairer to the insured. It recognizes the continuous and progressive nature of the disease and the nature of the insured's liability.[201] Proponents of the manifestation theory argue that in insurance law, liability is not ordinarily imposed until an identifiable harm arises. This argument construes the word "occurred" in a manner that reflects the interests of the insurer. This is contrary to the recognized rule that words in a coverage agreement must be given broad interpretation.

Prior to the Supreme Court of Canada's decision in City of Kamloops v. Nielson,[202] it was possible, however, for liability insurers to defend these actions on the basis that the injury occurred, and consequently, that the limitation period began to run from the inhalation of the first asbestos fibre. The worker's cause of action would have lapsed before he was even aware he was suffering from disease. In this decision, the Supreme Court stated that the damage occurs, and consequently the action accrues, when the material facts upon which it is based have been or ought to have been discovered through the exercise of reasonable diligence.[203] This decision lengthens the limitation period for these claims but leaves open the issue of which theory Canadian courts will accept as to which liability insurer must defend or indemnify. It is uncertain which theory the Canadian courts will accept.

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[201] The Limits of Liability for Coverage Agreement A specify that the amount designated in the declarations on the face page of the CGL policy applicable to each occurrence defines the monetary limits of the policy in any one occurrence, regardless of the number of persons or organizations involved, or claims made. Further, the amount available for each person in any one occurrence is limited to the amount that is also specified in the declarations. Part 7 of the "Limits of Liability" states:

> For the purpose of determining the limit of the insurer's liability, all bodily injury arising out of continuous and repeated exposure to substantially the same conditions shall be considered as arising out of one occurrence.

Accordingly, should coverage be found for long term disease cases on either the exposure or the manifestation theories, such coverage is subject to a stringent monetary limit. Acceptance of the exposure theory would leave insurers open to claims advanced by those whose risk of contracting cancer or other insidious disease is elevated by exposure to chemicals and so forth released into the atmosphere by the insured's operations. See: Techalloy Co. v. Reliance Ins. Co., 487 A. 2d 820 (Pa. Super. 1984); American Home Products Corp. v. Liberty Mutual Ins. Co., 565 F. Supp. 1485 (U.S. D.C., S.D. N.Y., 1983).

[202] (1984), 10 D.L.R. (4th) 641 (S.C.C.).

(b) The Definition of "Bodily Injury"

"Bodily injury" is defined in extremely broad terms. It includes injuries caused by external force and violence, as well as sickness and disease. Some CGL policies may define "bodily injury" in different terms, omitting the reference to "sickness" and "disease" or referring to only one of these terms. If the insured's business is such that it incurs risks that are very different from most insureds, its broker may append a manuscript endorsement[204] to the policy which refers to only one of these terms. Consequently it may be useful to know precisely what is meant by each word in the definition. What follows is a discussion of the terms "bodily injury", "sickness", and "disease".

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[203] This was the interpretation placed on The City of Kamloops v. Nielson, supra, n. 202, by the Supreme Court of Canada in Central Trust Co.v. Rafuse et al, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481, at pp. 535-536 (D.L.R.).

[204] A manuscript endorsement is an endorsement that is negotiated by the parties. Most endorsements are pre-printed, with standard form coverages.

(i) "Bodily Injury"

In Johnson v. Mutual of Omaha Insurance Company,[205] the insured, a medical doctor, habitually sniffed anaesthetic. The insured was found, dead, with a bathing cap containing a small amount of anaesthetic strapped around his face. It was determined that he died of asphyxiation. At issue was whether this cause of death is death by reason of "accidental bodily injuries". The court held that the insured did die of accidental bodily injuries. The death was not the result of natural causes but because of asphyxiation which fatally injured his body. The result in this case is so broad that it follows that any "harm" affecting the body that cannot be classified as an illness or disease constitutes "bodily injury".

It is sometimes the case that a plaintiff will suffer debilitating pain which may or may not have a pathological origin. Is this pain and suffering "bodily injury"?

Seer v. Royal Insurance Co.[206] involved a claim under an auto policy for permanent disability benefits as a result of a car accident. The plaintiff would be entitled to the benefits if she could show that she was left with a bodily injury that impaired her ability to earn a living. The plaintiff claimed to suffer debilitating pain and nausea. The preponderance of medical evidence indicated that the symptoms resulted from a psychological reaction to the accident. It was held that the pain and nausea constituted "bodily injury".

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[205] (1984), 45 O.R. 676, 8 D.L.R. (4th) 640 (Ont. C.A.); aff'g (1983), 39 O.R. (2d) 559, 139 D.L.R. (3d) 358, [1982] I.L.R. 6098 (para. 1-1586) (Ont. H.C.). Leave to appeal to the Supreme Court of Canada dismissed without written reasons, May 22, 1984.

[206] [1980] I.L.R. 905 (para. 1-1241) (Ont. Cty. Ct.).

Milashenko v. Co-operative Fire & Cas. Co.[207] involved a claim on a life insurance policy. The insured, a farmer, left a can of poisonous insecticide in the sun for a few hours, during which time he negotiated his life insurance policy with his agent who had dropped by. When he returned to the can, he accidentally inhaled the fumes which rushed out of the warmed can when he opened it. This startled him. He immediately experienced the symptoms of a heart attack; pains in his chest, faintness and a choking sensation. He panicked, and remained in an alarmed state until he died a few hours later. The medical evidence indicated that he had begun to suffer a mild heart attack while talking to his agent, but was completely unaware of it. It was speculated that the insured's alarmed state increased the severity of the heart attack which led to his death. The court held that the insured's anxious state was a bodily injury caused by the accidental inhalation of the poisonous fumes. The insurer was held liable to pay the accidental death benefits. The proximate cause of death fell within the coverage agreement "injury or loss of life...resulting from accidental bodily injuries due to external force or violence". It was not excluded by an exclusion for "injuries fatal or non-fatal, where there is no evidence of injury".[208]

In Levy v. Duclaux,[209] an employee of the insured dress shop, falsely accused the plaintiff of shop-lifting in front of many witnesses. The plaintiff suffered mental distress accompanied by crying and hysteria. The CGL insurer declined to defend her action against the dress shop on the grounds that the plaintiff had not sustained "[i]njury, sickness or disease" within the meaning of the coverage agreement. The court disagreed, holding that the claim for mental distress was covered, but was careful to point out that the mental distress sustained produced physical manifestations such as tears and hysteria.

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[207] [1970] S.C.R. (vi) (appeal noted), [1970] I.L.R. 925 (para. 1-326) (S.C.C.); rev'g (1968), 66 W.W.R. 557, 1 D.L.R. (3d) 89, [1968] I.L.R. 287 (para. 1-214) (Sask. C.A.).

[208] Ibid. at p. 100 (D.L.R.).

[209] 324 So. 2d 1, cert. den., 328 So. 2d 887 (La. App., 1975).

In Lowenthal v. Security Insurance Co. of Hartford,[210] a plaintiff sued the insured alleging, amongst other things, that he had sustained pain, suffering, and mental anguish due to the insured's inadequate performance of a contract to do underpinning and excavation work. At issue was whether this mental anguish constituted "bodily injury", requiring the CGL insurer to defend the action. The definition was identical to that considered here. It was held that the insurer had to defend that portion of the claim dealing with the allegations of mental anguish, as the definition of bodily injury encompassed the claim.

It follows from these decisions that "bodily injury" is any bodily harm resulting from an external, rather than an internal, pathological origin. As the Seer,[211] Milashenko,[212] and Levy[213] decisions indicate, indices of mental anguish such as pain, nausea, tears, and hysteria will constitute "bodily injury" if these symptoms result from an external cause--an accident, or a reaction to an accident.. In Lowenthal,[214] the court did not have any such evidence before it. However, in that case, the court simply had to decide if the claim, if proven, came within coverage.

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[210] 436 A. 2d 493 (Md. App., 1982).
[211] Supra, n. 206.
[212] Supra, n. 207.
[213] Supra, n. 209.
[214] Supra, n. 210.

(ii) "Sickness or Disease"

"Sickness or disease" refers to conditions that have a pathological origin.[215] In Tomlinson v. Prudential Insurance Company of America,[216] the court commented on "disease" as it appeared in a life insurance policy:

> The word "disease" as used in the policy of insurance must be taken in the same sense in which it would be understood by the ordinary policy-holder and not as a technical term. In that sense it is an ailment that disorders one or more of the vital functions or organs of the body, causing a morbid physical condition.[217]

Disease is a deviation from healthy or normal functions.[218] It alters the state of the body or some of its organs, interrupts or disturbs performance of vital functions, and causes or threatens to cause weakness or pain.[219] It may be caused by specific infective agents, by inherent defects of the body, or by a combination of these factors.[220] "Sickness" is a condition interfering with a person's usual activities, but it is understood that disease may exist without such a result.[221] A person who performs his usual occupation, even though some bodily organ may be disordered, is not considered sick.[222] He would be considered sick if that disorder incapacitated him.[223]

"Sickness or disease" mean what they say. These terms can encompass something as "minor" as a headache, or as "major" as leukaemia.

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[215] Kerr v. British Columbia Motorist Ins. Co., [1972] 6 W.W.R. 400, 30 D.L.R. (3d) 443, [1972] I.L.R. 482 (para. 1-509) (B.C.S.C.T.D.).

[216] [1954] O.R. 508, [1954] 3 D.L.R. 650, [1954] I.L.R. 596 (para. 1-144) (Ont. C.A.).

[217] Ibid., at p. 653 (D.L.R.).

[218] Brinkoetter v. Pyramid Life Insurance Co., 377 S.W. 2d 560 (Miss. App., 1964).

[219] Ibid.

[220] Ibid.

[221] Georgian International Life Ins. Co. v. Henderson, 280 S.E. 2d 863 (Ga. App., 1981).

[222] Ibid.

[223] Ibid.

(c) Whether the Consequences of "Bodily Injury" are Covered

Coverage Agreement A states that the insurer will pay on behalf of the insured "...all sums which the insured shall become legally obligated to pay...*because of* bodily injury." The Compact Edition of the Oxford English Dictionary states that "because" followed by "of" is synonymous with "by reason of" or "on account of". "On account of" is defined as "in consideration of"; "for the sake of"; "by reason of". All these phrases imply a direct link. Consequently, claims for loss of consortium, or a fatal accident claim brought by a dependant, would be a claim "because of", "by reason of" or "on account of" bodily injury and are therefore covered.

(d) Conclusion

As coverage for bodily injury is not predicated on an "accident", a sudden and fortuitous event, liability for long term exposure diseases is covered under the CGL policy. As the definition of "bodily injury" states that the bodily injury must occur during the policy period (which in turn is defined by the declarations on the face page of the policy), the problem associated with this coverage is the necessity of proving when the disease occurred. Canadian courts are constrained to hold that this type of disease occurs when the plaintiff ought to have discovered the disease through the exercise of reasonable diligence.

Although there is little authority as to the meaning of "bodily injury" it is clear that it is a flexible term, referring to harm to the body associated with external, rather than pathological cause. Where there are proven physical symptoms of the condition, claims for pain, suffering, hysteria, and mental anguish are covered. "Sickness or disease" refer to bodily disorders of pathological origin, regardless of their severity.

The coverage agreement states that coverage will be extended for claims arising "because of" bodily injury. Consequently the policy would cover a claim for loss of consortium brought by the spouse of a person injured by the insured's activities, or a fatal accident claim brought by a dependent of a person fatally injured or diseased because of the insured's operations.

5.2 COVERAGE FOR "PROPERTY DAMAGE"

Coverage Agreement B, reads as follows:

> To pay on behalf of the **Insured** all sums which the **Insured** shall become legally obligated to pay as compensatory damages because of **property damage** caused by accident.

"Insured" and "property damage" are defined in the definition section of the policy shell. The definition of "insured" was considered in Chapter 3. "Property Damage" is defined as follows:

> "property damage" means (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by accident occurring during the policy period.

The first part of the definition requires proof that tangible property was physically injured or destroyed in the policy period. The policy period is defined by the declarations contained on the face page of the policy. The second part of the definition requires proof that an accident caused loss of use of tangible property during the policy period. It is curious that part (2) of the definition requires proof that the event giving rise to the loss of use tangible property is an accident, when part (1) omits any reference to an accident. In any event, it is superfluous to mention accident in part (2), because the coverage agreement requires that property damage as defined occur as a result of an accident before coverage extends to it. If it is determined that property damage as defined has occurred, that it was caused by an accident, that the accident occurred during the policy period, the accident occurred within the policy territory,[224] and that the insured is legally obligated to pay compensatory damages for that property damage, the policy applies -- subject to the exclusions, conditions, and endorsements. All of these conditions must be met. If some of the conditions are present, but others are not, the policy does not apply and the claim is not covered.

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[224] Section IV of the Insuring Agreements states:
"This insurance only applies to **bodily injury** and **property damage** which occurs within the **policy territory**.

"Policy territory" is in turn defined as:

"...

(i) Canada or the United States of America, its territories or possessions, or

(ii) anywhere in the world with respect to compensatory damages because of **bodily injury** or **property damage** arising out of a product which was sold for use or consumption within the policy territory described in paragraph (i) above, provided suit for such compensatory damages is brought within such territory."

The definition of property damage in the 1978 I.B.C. CGL model wording is identical to the definition of property damage in the 1973 American model CGL wording. Judgments and comments on policies using the American model wording illustrate the insuring intent behind this important definition. To understand the insuring intent, one must understand its history.

The property damage definition in the 1973 American model CGL wording is the product of three policy revisions which occurred in 1955, 1966, and 1973. The insuring intent of the 1955 wording was substantially the same as the 1973 wording: to cover the insured's legal liability for accidental physical injury to, or destruction of tangible property; and for the insured's legal liability for the accidental loss of use of tangible property. Judicial construction of the 1955 wording did not conform with this insuring intent. The 1966 policy revision was intended to remedy the situation. Adverse judicial construction forced a further policy revision in 1973. The 1973 American model wording is identical to the 1978 I.B.C. CGL model wording.

It appears that the courts and the insurance industry are at last in agreement as to the meaning of "property damage". What follows is a discussion of the evolution of the current definition. Cases interpreting the older wordings remain useful as some insurers are currently using policies that contain wordings similar to, if not identical with, these older wordings.

(a) The 1955 Wording

In the 1955 policy, coverage for property damage liability was worded as follows:

> Coverage B--Property Damage Liability--To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including loss of use thereof, caused by accident.

Property damage was not defined. Two difficulties emerged with respect to the phrase "injury to or destruction of property": (1) did "property" refer to tangible or intangible property? (2) what constituted "injury" to property?

The insurers disagreed amongst themselves as to what constituted "property".[225] Some insurers were of the firm belief that the usual and ordinary meaning of "property" was "tangible property". Intangible property could not be injured or destroyed in an accident and was therefore outside the scope of the policy.[226] In 1959, the California Supreme Court agreed that "property" referred to tangible property:[227]

> Thus it is such property, not goodwill of a business entity, that is ordinarily thought of as the subject of use, and it is to damage to such property that all the exclusions are directed. Any breach of contract may harm the business of the injured party, and if sufficiently serious, may affect his goodwill. Such damages, however, are not commonly thought of as injuries to or destruction of property within the meaning of a public liability insurance policy.

Other courts held opposite views. The Washington Supreme Court stated in 1958:[228]

> ...property is a term of the very widest significance. It is here used without qualification and should not receive a narrow or technical meaning, and as the United States Court of Appeals said

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[225] German, Edward C., *The New Comprehensive General Liability Policy*, Defense Research Institute (DRI), Speech Bank, Speech No. 131, at p. 32.

[226] Johnston v. Tally Ho Inc., 303 A. 2d 677 (Del., 1973).

[227] Geddes Smith Inc. v. St. Paul Mercury Indemnity Co., 334 P. 2d 881 (Calif., 1959), at p. 885.

[228] Wells Lamberton v. General Cas. Co. of America, 332 P. 2d 250 (Wash., 1958), at p. 254-255.

> > "..."property" is a word of very broad meaning and when used without qualification, may reasonably be construed to include obligations, rights and other intangibles, as well as physical things."
>
> ...
>
> It is not limited to tangible property or intangible property, but is an all encompassing word.

Despite disagreement amongst the insurers as to what was intended to be covered, the majority felt that the true intent was to cover injury to or destruction of tangible property.[229] As the courts found that the words used exceeded this coverage intent, revision of the policy became necessary.[230]

A trio of Canadian cases discussed whether the costs of preventing "injury to or destruction of property" were within the 1955 coverage agreement: Hildon Hotel(1963) Ltd. v. Dominion Ins. Corp. Ltd.;[231] Canadian Equipment Sales & Service Co. Ltd. v. The Continental Insurance Co.;[232] Greenwood Forest Products Ltd. v. The United States Fire Insurance Co.[233]

In Hildon,[234] an oil storage tank, located in the basement of the insured's beachfront hotel, leaked its contents into Vancouver Harbour, in the immediate vicinity of privately owned wharves. The National Harbours Board contained the oil by using three vessels to boom the area, but the tide rose, carrying the oil up the creosoted piles of the wharves. They eventually disposed of the oil by spraying on an emulsion. The court characterized the presence of the oil as a fire hazard, a danger to life, a danger to the ecology of the surrounding beaches, a hazard to watercraft and an immediate hazard to and interference with the use of the wharves. The insured was held liable to the Harbours Board for the expense it incurred in the clean-up.[235] The issue in this action was whether the insured could recover this amount from its CGL insurers under a coverage agreement identical to the 1955 wording. The court stated that "injury" is a distinct concept from "damage". "Injury" to property is the infringement of some right to property. "Damage" to property is some pecuniary loss of property. The wharves were "injured" as oil was on and under them, and vessels could not use them. The insured's liability to the Harbours Board was liability for property damage within the meaning of the coverage agreement.

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[229] Obrist, W.J., *New Comprehensive General Liability Insurance Policy*, DRI Monograph, General Liability Insurance--1973 Revisions, Vol. 74, No. 1, pp. 38-46, at p. 40.

[230] Ibid.

[231] (1968), 66 W.W.R. 289, 1 D.L.R. (3d) 214, [1969] I.L.R. 627 (para. 1-680) (B.C. S.C.)

[232] (1975), 9 O.R. (2d) 7, 59 D.L.R. (3d) 133,[1975] I.L.R. 1193 (para. 1-680) (Ont. C.A.); rev'g (1974), 5 O.R. (2d) 220, 50 D.L.R. (3d) 30, [1975] I.L.R. 1132 (para. 1-663) (Ont. H.C.). Application for leave to appeal to the Supreme Court of Canada, dismissed without written reasons, October 8, 1975.

[233] (1982), 32 B.C.L.R. 323, [1982] 3 W.W.R. 739, 133 D.L.R. (3d) 486, [1982] I.L.R. 5836 (para. 1-1526) (B.C. S.C. T.D.).

[234] Supra, n. 231.

In the Canadian Equipment[236] case, the Ontario High Court held the insured liable to the third party, a general contractor, for its failure to properly perform a contract to connect the ends of a pipeline that the third party was installing. The insured negligently allowed a piece of pipe that it had cut to fall into the pipeline. If the piece of pipe blocked the pipeline, cooling water would be prevented from reaching chemical reaction tanks. If that happened, chemical reactions in the tanks would produce inflammable gases that would blow out through safety valves and cause a major fire. The insured was liable for the cost of labour and materials incurred in a valiant but unfruitful attempt to locate the piece of pipe. It ultimately became apparent that the piece of pipe had settled to the bottom of the pipeline and would not impede the flow of coolant. The Ontario Court of Appeal held that the costs for which the insured was liable were covered under the policy. The pipeline was impaired or imperfect from the moment the piece of pipe entered the pipeline, constituting an "injury" to the pipeline.

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[235] National Harbours Board v. Hildon Hotel (1963) Ltd. (1967), 61 W.W.R. 75, 64 D.L.R. (2d) 639 (B.C. S.C. T.D.).

[236] Supra, n. 231.

In Greenwood Forest Products,[237] a toxic chemical, PCP, escaped from a storage tank at the insured's sawmill. The chemical contaminated the soil and ground water systems, rendering them unfit for fish, and for human consumption. The nearby Okanagan River and Skaha Lake were threatened. Federal and provincial agencies cleaned up the chemical and presented the bill to the insured. At issue was whether these costs constituted "damages because of injury to or destruction of property" within the meaning of the coverage agreement. The court held that the discharge of the chemical into the water system was an injury to that system. The attempt to locate and eliminate the pollution was a direct and natural consequence of that injury which the insured was legally obligated to pay. The policy covered this liability.

It followed from these cases that "injury to or destruction of property" is a broad concept. Property is injured or infringed when it is *suspected* that it is damaged, contaminated or impaired (for example, suspecting that a pipeline is blocked), as well as *actually* damaged, contaminated or impaired (for example, allowing PCP's to escape into a river system). The policy was not intended to cover claims of *suspected* property damage. This aspect of the property damage coverage needed revision.

(b) The 1966 Wording

In 1966 coverage for property damage was revised as follows:

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[237] Supra, n. 233.

> Coverage A--Bodily Injury Liability,
> Coverage B--Property Damage Liability
>
> The company will pay on behalf of the insured all sums which the insured shall become obligated to pay as damages because of:
>
> > Coverage A--bodily injury or
> > Coverage B--property damage
>
> to which this policy applies, caused by an occurrence...

"Property damage" was defined:

> Property Damage means injury to or destruction of tangible property.

"Damages" was also defined:

> "Damages"...includes damages for loss of use of property resulting from property damage.

The "Explanatory Memorandum of Changes" which accompanied the American 1966 wording, had this to say about the definition of property damage:

> This definition together with the definition of "damages" is intended to produce the same effect as present policies. The definition limits coverage to legal damages for injury to tangible property...loss of profits from an unsuccessful venture are not covered. But, of course, damages for injury to tangible property include, as before, damages for its loss of use.

This new wording begged the question, what is "tangible property"? Further, if the insured caused intangible injury to tangible property, was that liability covered?

(i) What is "Tangible Property"?

In Neuman v. The Travellers Indemnity Co.,[238] the court was asked to determine whether a right to occupy premises as a tenant constitutes a tangible property right. The court held this was a valuable, but intangible property right to occupy the property for the remainder of the term of the lease.[239] The court went on to define "tangible property" in a CGL Policy as follows:

> Tangible property is that which may be felt or touched; property capable of being possessed or realized; readily apprehensible by the mind; real; substantial; evident; such property may be seen, weighed, measured and estimated by the physical senses; having substance and body as contrasted with the incorporeal rights such as franchises, choses in action, copyrights, the circulation of a newspaper, annuities and the like. It is visible, accessible, and easy to identify. Tangible property must necessarily be corporeal, but it may be either real or personal. "Tangible property" is syno-nymous with "goods, wares, and merchandise".[240]

In Lay v. Aetna Ins. Co.,[241] the insured was employed by the third party to locate and supervise the drilling of an oil well. It negligently did so on land that was not leased to the third party. The court was asked to decide whether the third party's claim for the purchase price of a portion of a lease on which an oil well had been drilled, and the consequent legal and surveyor fees, constituted "physical injury to or destruction of tangible property". The court held that these costs were not covered as:

> ...the purchase of the assignment was an economic transaction involving the exchange of money for the privilege of drilling and producing oil. Likewise, the attorney and surveyor fees were mainly expenses necessarily

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[238] 319 A. 2d 522 (Md. App., 1974).

[239] Ibid. at p. 525.

[240] Ibid.

[241] 599 S.W. 2d 684 (Tex. App., 1980).

> incurred in the process of negotiating and acquiring the lease...Consequently, there was no injury to, or destruction of, or loss of use of "tangible property".[242]

Harm to the business and goodwill of the injured party is not "injury to or destruction of tangible property". For example, if the insured manufactures a defective item which is incorporated into another party's product, that party's reputation in the market place may suffer. If that party sues for its diminished reputation, the insurer is not bound to extend coverage.[243]

In Hartford Accident and Indemnity Co. v. Case Foundation Company,[244] it was decided that investments, anticipated profits and financial interests in business ventures are intangibles, and were not "property" under the 1966 CGL model wording.

In Travellers Indemnity Company v. State of Arizona,[245] the State of Arizona was sued by the depositors of two financial institutions for its failure to properly regulate and supervise these institutions. The State sought to have these claims covered by its CGL policy. The insurer countered the argument that the depositors' lost money was tangible personal property by stating that what the depositors lost was their investments. When the depositors left their money with the institutions, a debtor-creditor relationship was established. A credit is a chose in action. A chose in action is intangible property. The court agreed that the policy did not cover these claims.

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[242] Ibid. at p. 686.

[243] Geddes & Smith Inc. v. St. Paul Mercury Indemnity Co., supra., n. 227.

[244] 294 N.E. 2d 7 (Ill. App., 1973).

[245] 680 P. 2d 1255 (Ariz. App., 1984).

The courts are in apparent agreement with the insuring intent regarding the meaning of tangible property. Economic losses, like lost profits, loss of goodwill, loss of anticipated benefit of a bargain, and loss of investment, do not constitute injury or damage to tangible property. However, if these losses are the consequence of the damage to another party's property, are they recoverable? The answer is "no". If as a result of the insured's operations, the third party simply suffers a loss of revenue--pure economic loss without damage to its tangible property, the policy does not apply. However, if the insured suffers damage to its tangible property, and the only way of quantifying that loss is to calculate its lost revenue, then the insured will be indemnified for that amount. This does not mean that lost revenue caused by damage to tangible property is covered. The 1966 wording recognized this fact, and was structured to cover such losses.

In Cargill v. Liberty Mutual Insurance Co.,[246] the insured sold soya grits to the plaintiff for use as a medium for growing micro-organisms to produce an antibiotic. High levels of phosphorous in the grits reduced the yield. At issue was whether the dollar value of the reduced yield constituted "injury to or destruction of tangible property", and was therefore covered, or whether it was a claim for lost profits and not covered as it would be a claim for intangible property damage. The court held that the claim was covered as the dollar value of the reduced yield quantified the damage to the tangible property.

Further, the 1966 CGL model wording was intended to cover claims for lost profits if an insured caused an accident which prevented a third party from using its tangible property. "Property damage" was defined loosely to include "injury" to property. The definition of "damages" spoke of "...damages for loss of use...". If the insured's road grader broke down, blocking the entrance to a third party's store, the policy was intended to cover the insured's liability for the third party's loss of revenue because of the forced closure of the store.[247] The third party's property suffered "property damage" as defined as it was injured; the third party could not use the store as a store and therefore his property rights in the store were infringed or injured. The third party's lost revenues, and the insured's liability for those lost revenues is covered as the definition of "damages" speaks of damages for "...loss of use...", which is quantified by the lost revenue.

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[246] 488 F. Supp. 49 (D.Minn., 1979).

The courts interpreted the loss of use provisions differently. They held that the words "injury to or destruction" in the insuring agreement applied to damages "because of" property damage. This permitted the conclusion that recovery could be had for consequential, damage arising from the physically damaged tangible property, as well as the actual physical damage to tangible property.[248] For example, if the insured suffered actual damage to property, courts tended to state that the actual damage to the property was covered plus any loss of revenue resulting from that damage. As the Supreme Court of Montana stated in 1974:[249]

> ...it is of utmost importance to note that the policy does not, by any stretch of the imagination, require that there be tangible damage to tangible property. Clearly, it was not...[the insurer's]...intention to exclude consequential damages or they would have said so in the policy.

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[247] Obrist, supra, n. 229, at p. 40. An illustration of how the 1966 coverage wording regarding loss of use of property are circumscribed by the exclusion is found in McDowell-Wellman Eng. v. Hartford Accident and Indemnity, 711 F. 2d 521 (U.S. C.A., 3rd Cir., 1983).

[248] Narko, Medard M., *The 1972 Comprehensive General Liability Policy: Response to a Continuing Need*, 61 Illinois Bar Journal, pp. 34-38, at p. 35 (Sept., 1972).

[249] Safeco Insurance Co. v. Munroe, 527 P. 2d 64 (Mont., 1974), at p. 68. Other cases that have similar holdings are: Hauenstein v. St Paul-Mercury Indemnity Company, 65 N.W. 2d 122 (Minn., 1954); Goodyear Rubber & Sup. Co. Inc. v. Great American Ins. Co., 471 F. 2d 1343 (9th Cir., 1973); Western Cas. & Sur. Co. v. Polar Panel Co., 457 F. 2d 957 (8th cir., 1972); Arcos Corp. v. American Mutual Liability Inv. Co., 350 F. Supp. 380 (E.D. Pa., 1972); Geddes & Smith Inc. v. Saint Paul-Mercury Indemnity Co., supra, n. 227; United States F. & G. Co. v. Nevada Cement Co., 561 P. 2d 1335 (Nev., 1977); Dakota Block Co. v. Western Cas. & Sur. Co., 132 N.W. 2d 826 (S.D., 1965); Aetna Cas. & Sur. Co. v. General Time Corp., 704 F. 2d 80 (U.S. C.A., 2nd Cir., 1983).

It is unlikely that the Hildon Hotel,[250] Canadian Equipment,[251] and Greenwood[252] cases would have been decided any differently under the 1966 wording.

Under the 1966 policy wording, the courts felt that: (1) if a defect in the product furnished or the work completed by the insured caused damage to other tangible property, there was coverage for that damage; (2) there did not need have to be physical damage to the third party's property for coverage to exist; (3) tangible property was damaged when it was diminished in value or made useless, irrespective of actual physical injury to tangible property.[253] As an example of point (3), if the insured located his scrap yard near some residential homes, it was thought that the homeowners' nuisance claim for their reduced property values would be covered even though the homes were not physically damaged.

The insuring intent of the 1966 wording was very different from these conclusions. Regarding points (1) and (2), it was intended that there would be coverage if the defect in the product furnished or the work completed by the insured caused *physical* damage to *tangible* property. Regarding point (3), diminished value does not constitute physical damage to tangible property. The insured should not be covered for the nuisance claim mentioned above. A further policy revision was the industry's solution to this dilemma.

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[250] Supra, n. 231.

[251] Supra, n. 232.

[252] Supra, n. 233.

[253] Goodyear Rub. & Sup. Co. Inc. v. Great American Ins. Co., 471 F. 2d 1343 (9th Cir., 1973); Western Cas. & Sur. Co. v. Polar Panel Co., 457 F. 2d 957 (8th Cir., 1972); Arcos Corp. v. American Mutual Liability Co., 350 F. Supp. 380 (E.D. Pa., 1972); Geddes & Smith Inc. v. St. Paul Mercury Indem. Co., supra, n. 227; United States Fidelity & Guarantee Co. v. American Ins. Co., 345 N.E. 2d 267 (Ind. App., 1976); United States Fidelity & Guarantee Co. v. Nevada Cement Co., 561 P. 2d 1335 (Nev., 1977); Dakota Block Co. v. Western Cas. & Sur. Co., 132 N.W. 2d 826(S.D., 1965); contra Hamilton Die Cast Inc. v. United States Fidelity & Guarantee Co., 508 F. 2d 417 (7th Cir., 1975); Hartford Accident & Indemnity Co. v. Olson Bros. Inc., 188 N.W. 2d 699 (Neb., 1971).

(c) The 1973 Wording

The 1973 policy revision struck the 1966 definitions of "property damage" and "damages", and replaced them with the current two part definition of "property damage". The addition of "physical" in part (1) of the definition made it clear that intangible, or non-physical damage to another's property is not covered.[254]

The courts have appreciated the significance of the change in wording.

In Millers Mut. Fire Ins. Co. v. Bailey,[255] the insured's installation of highly inflammable insulation in the third party's building did not cause physical injury to the structure. There was no discernible effect on the building. A spark was required to affect the building's structural integrity. As there was no physical damage to the building, the insured's liability to the plaintiff was not covered.[256] This might have constituted "loss of use of tangible property which had not been physically injured or destroyed" if there had been evidence before the court of loss of use.

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[254] See Long, *The Law of Liability Insurance*, para. 11:09 (1976 ed.). Often, physical injury to the tangible property is best measured by the diminution in value of the property. That does not mean that claims for diminution in value are covered under the 1973 wording: Missouri Terrazo Co. v. Iowa Nat. Mut. Ins. Co., 740 F. 2d 647 (U.S. C.A., 8th Cir., 1984); Federated Mutual Ins. Co. v. Concrete Units, 363 N.W. 2d 751 (Minn., 1985); Western Exterminating Co. v. Hartford Accident and Indemnity Co., 479 A. 2d 872 (D.C. App., 1984); American Home Assur. Co. v. Libbey-Owens-Ford Co., 588 F. Supp. 766 (U.S. D.C., 1984). The court improperly came to the wrong conclusion in Lassen Canyon Nursery Inc. v. Royal Ins. Co. of America et al, 720 F. 2d 1016 (U.S. C.A., 9th Cir., 1983).

[255] 647 P. 2d 203 (Mont., 1984).

[256] There was no discussion as to whether this claim fell within the second part of the definition as "loss of use of tangible property". This is probably because there was no evidence that the third party declined to use or could not use the premises. This would qualify as loss of use if For a similar case, see Lindsay Drilling and Contracting et al v. United States Fidelity and Guar. Co., 676 P. 2d 203 (Mont., 1984).

In Wyoming Sawmills v. Transportation Ins. Co.,[257] the insured lumber company manufactured solid wood studs which were installed in a third party's building. Some time after installation, they warped and twisted. The third party replaced the studs. It sued the insured for the cost of new studs, and for the labour costs of taking out the old studs and installing the new ones. The insurer declined to defend or pay the claim.[258] The court held that there was no evidence that the defective studs had damaged the third party's property, and consequently the labour costs to replace them was not covered. However, to replace the studs, the plaintiff was required to tear out and put back other parts of the building. The court held that the labour costs for this work, for which the insured was liable, was covered as it was the result of physical damage to tangible property. The court was very careful to ensure that the insured was liable for "property damage" as defined, before declaring that the policy applied. However, the property damage in question was caused when the insured deliberately ripped out the defective studs. Is this property damage caused by an accident or an occurrence? The court did not address this point. It can only be assumed that the court considered the installation of defective studs in the building to be the requisite accident or occurrence which resulted in the property damage.

The facts in the Alberta case of Carwald Concrete & Gravel Co. Limited v. General Security Ins. Co. et al.[259] are virtually identical to those of Wyoming Sawmills.[260] The insured supplied and poured the concrete necessary to build a gas plant in northern Alberta. The concrete was poured over reinforcing bar and electrical conduits. The concrete was weaker than the contractor's specifications due to a defective shipment of cement powder which the insured incorporated into its concrete. The insured tore out the concrete. This forced replacement of the underlying reinforcing bars and electrical conduits. The contractor sued the insured for unspecified expense flowing from the removal of the concrete. The insured sued its supplier for unspecified expense due to the deficient shipment of cement powder. The Court referred to cases interpreting "property damage" in liability policies, however, none of these cases defined property damage as "physical injury to or destruction of tangible property". The Court found that property damage as defined occurred, but it is not clear if the Court was referring to part (1) or part (2) of the definition. At one point in its reasons the Court said that property damage occurred because the reinforcing bar, electrical conduits, and the pad itself could not be used.[261] At another point it states that physical injury to tangible property occurred.[262] It is difficult to extract from this judgment just what was considered property damage.

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[257] 578 P. 2d 1253 (Or., 1978).

[258] Coverage was denied on the basis of the "product itself" exclusion, discussed in Chapter 10, the "performance exclusion" discussed in Chapter 12, and the "recall and sistership" exclusion.

[259] (1985), 70 A.R. 340, 42 Alta. L.R. (2d) 224, 17 C.C.L.I.241, 24 D.L.R. (4th) 58, [1986] I.L.R. 7951 (para. 1-2061)(Alta. C.A.). Additional reasons, 17 C.C.L.I. 241 at p. 265 (Alta. C.A.). Leave to appeal to the Supreme Court of Canada, refused (1986), 17 C.C.L.I. 241n., 69 N.R. 78n (sub. nom., General Security Ins. Co. v. Carwald Concrete & Gravel Co.).

[260] Supra, n. 256.

The 1978 I.B.C. model CGL wording refers to "physical injury to or *destruction* of tangible property". If the insured loses a third party's property, has the insured incurred liability on account of "physical... destruction of tangible property"?

In State of Vermont v. Glenn Falls Insurance Co.,[263] a state employee ordered and received some coloured slides from a third party. The employee mailed them back but the third party never received them. The court held that the State's liability for the loss of the slides was not covered by the CGL policy issued to the State as there was no evidence that the slides could not be found and accordingly, the destruction was conjectural. Simple disappearance does not constitute "destruction".

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[261] Supra, n. 258, at p. 7954.

[262] Ibid, at p. 7955.

[263] 315 A. 2d 257 (Ver., 1974).

In contrast, when a pile driver capsized on a lake, and tools equipment went to the bottom, the British Columbia Supreme Court[264] held the property was "destroyed" within the meaning of an exclusion to a liability policy, even though its location was known.

As the 1978 I.B.C. CGL model wording speaks of "*physical* injury to or destruction of tangible property", it is likely that a Canadian court interpreting this wording would require evidence that the property had been physically destroyed before declaring the liability to be covered. Similarly, there must be evidence that the property has disappeared before the conclusion can be drawn that the property has been destroyed within the meaning of the definition. This gives rise to evidentary difficulties which can only be met by proving the items whereabouts until the time it disappeared, and the attempts that have been made since to retrieve it.

Judicial construction of part (1) of the property damage definition is in line with the policy's insuring intent. The Wyoming Sawmills[265] case is an excellent example of a court interpreting a revision to an insurance policy and recognizing the difference from former wordings. However, as indicated, it appears to ignore the requirement that the property damage must be caused by an accident or occurrence.

The second part of the 1973 property damage definition is an attempt to clearly express the insuring intent regarding "loss of use". If there is a claim for loss of use of tangible property that has not been physically injured or destroyed, coverage is available provided the loss of use was caused by an accident occurring during the policy period. This part of the definition gives rise to what is known as the sick elephant situation:

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[264] British Columbia Bridge & Dredging Co. Ltd. v. Royal Exchange Assurance, [1960] I.L.R. 744 (para. 1-353) (B.C. S.C. T.D.).

[265] Supra, n. 256.

> Macy's store...[in New York City]...has a large parade during the Thanksgiving season. Suppose during this parade one of the elephants got sick and fell down in front of the entrance to a place of business such as a store preventing access to the store. There would be no damage to the store but there would be loss of use of tangible property, which under this new definition would be covered.
>
> Another example would be the accidental breaking of an electrical conduit which shut off electricity to a manufacturing plant, and to a cold storage locker for say a period of 48 hours. The locker plant would suffer physical damage to tangible property. It is the intent to cover both claims in this situation...[266]

The initial inquiry is whether or not there is "loss of use" of tangible property. Assuming a positive answer, the next question is whether the loss of use was caused by an accident during the policy period. Three examples of courts correctly interpreting the insuring intent behind the "loss of use" provisions are as follows:

--The insured service station's underground gas tanks leaked into the ground. When the leak was discovered, municipal authorities cordoned off the area, resulting in the closure of the third parties' businesses. Claims for lost business resulting from the closure were covered under the insured's CGL policy: United Pacific Ins. v. Van's Westlake Union[267]

--The insured caused construction delays which deferred the opening of a project. The project owner sued the insured for the delay. That claim constituted loss of use within the property damage definition because the project owner was unable to use the project during the period of delay: Federated Mutual Ins. Co. v. Concrete Units[268]

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[266] Young, Changes in the Standard Provisions For General Liability Policies--Effective January 1, 1973, unpublished paper, DRI Speech Bank, p. 6. For a case directly analogous to the "sick elephant" situation, see Geurin Contractors v. Bituminous Cas. Co., 636 S.W. 2d 638 (Ark. App., 1982).

[267] 664 P. 2d 1262 (Wash. App., 1983).

[268] 363 N.W. 2d 751 (Minn., 1985).

--The insured sold 200, fifty pound bags of seed for cattle feed to a third party. Unknown to the insured and the plaintiff, four of the bags contained seed for pig feed. All the seed was planted. When the crop grew, the plaintiff realized that part of the crop was of no use to him. The court held that the third party suffered a loss of use of the field planted with the wrong seed. The third party's production losses were a measure of that loss of use: Western Cas. & Sur. Co. v. Edward C. Budgrus[269]

The fact situations in Hildon Hotel,[270] Canadian Equipment[271] and Greenwood,[272] might be decided differently under the 1978 I.B.C. CGL model wording. As the coverage agreement speaks of "*physical* injury to or destruction of tangible property" more is required than just a threat of destruction before there is coverage under part (1) of the property damage definition. If in Hildon Hotel[273] there was evidence that the wharves became unusable as result of the influx of oil, as well as evidence that could quantify that loss of use, then that portion of the claim would be covered under part (2) of the definition. Similarly, in Canadian Equipment,[274] a claim for construction delays caused by the search for the piece of pipe in the pipeline would be covered as it would be a loss of use of tangible property caused by an accident. It is likely that the facts in Greenwood[275] would result in coverage under part (1) of the definition as undoubtedly the introduction of PCPs into the soil and ground water caused physical damage to those systems. The clean-up costs are a quantification of that claim.

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[269] 332 N.W. 2d 837 (Wis. App., 1983).
[270] Supra. n. 231.
[271] Supra. n. 232.
[272] Supra. n. 233.
[273] Supra. n. 231.
[274] Supra. n. 232.
[275] Supra. n. 233.

5.3 CONCLUSION

The most important definition in the CGL policy is the "property damage" definition. As most of the exclusions are directed at various forms of property damage, this concept must be understood before the coverage provided by the CGL policy is understood. In order to understand it, one must understand the insuring intent.

There is no doubt that the early versions of the policy expressed that intent in a rather inept manner. The current definition is clear and comprehensive. The courts must realize that this definition is very different from its predecessors. They must be urged to consider cases interpreting different wordings with care as the result will differ in each case depending on the wording used. The best example of a court giving the current wording the recognition it deserves is Wyoming Sawmills.[276] An example of a court that pays little or no heed to the wording before it is Carwald Concrete.[277]

The history of the property damage definition illustrates the need for policies to be draughted in a clear, comprehensive manner. Failure to do so results in adverse judicial construction of the policy. This causes the policy to cover a broader basis of risk than intended, which in turn leads to underwriting losses as the premium rates are only set according to what the industry believes the policy covers.

As indicated in the discussion of "bodily injury", there is very little controversy concerning this definition. This is due in part to the extremely clear terms in which it is expressed, and the fact that most claims for bodily injury presented under the CGL policy deal with clearly recognizable forms of injury or disease.

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[276] Supra, n. 256.

[277] Supra, n. 258.

The majority of litigation dealing with the policy centre on claims for "property damage". The exclusions analysed in Chapters 7 to 12 inclusive deal with claims for property damage that are excluded from coverage.

Chapter 6

Accident and Occurrence

Coverage Agreement B of the CGL Policy states that the insured's liability for "property damage" sustained by a third party is covered if it is caused by an accident:

> Coverage Agreement B --Property Damage Liability
>
> To pay on behalf of an **Insured** all sums which the **Insured** shall become legally obligated to pay as compensatory damages because of **property damage** caused by an accident.

"Accident" is one of the corner-stones of coverage. Section 6.1 discuss the insuring intent behind the use of "caused by accident" and how that concept evolved through the decided cases. Section 6.2 indicates some of the difficulties with the concept. These difficulties resulted in the trend that bases coverage for property damage liability on another event: "occurrence". "Occurrence" is defined as "continuous or repeated exposure to conditions which results in property damage neither expected nor intended from the standpoint of the insured".

The Insurance Bureau of Canada has published a standard form endorsement,[278] which insureds can purchase for an additional premium, and which permits recovery for property damage where it is caused either by an accident or an occurrence:

> When used in this policy (including endorsements forming a part thereof):
>
> "accident" includes continuous or repeated exposure to conditions which results in property damage neither expected nor intended from the standpoint of the Insured.

The insuring intent of this endorsement is discussed in section 6.3. Section 6.4 discusses the requirement that the damage must occur within the policy period and within the policy territory.

6.1 THE INSURING INTENT OF "ACCIDENT" AND HOW IT IS VIEWED BY THE COURTS

The three words, "caused by accident" were used in the coverage agreement of the first American standard form policy in 1935. It was used in all standard form policies issued in the United States until 1966. It was present in all Canadian CGL policies for the same period until it was gradually replaced with policies that founded coverage on either an accident or an occurrence. Nonetheless, there are policies still in use today that refer to "accident" rather than "occurrence".

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[278] Form No. 2009, Edition date: February, 1979.

> "Caused by accident" was chosen for at least two purposes:
>
> (1) The first purpose of the phrase was to have coverage actuated by an identifiable event which is sudden, detrimental and fixed in time and place, rather than to apply to less clear-cut gradual injury or damage which may emerge over an uncertain period of time and in an uncertain area. The accident limitation was intended to carve out an easily identifiable area for coverage.
>
> (2) The second purpose of the phrase was to eliminate coverage for intentional injury or damage, or expected harm from deliberate conduct.[279]

The insurers felt that gradual property damage, such as damage from waste disposal, smoke, fumes, dust, vibration, radiation and settling due to excavation, was uneconomic to insure under a standard form policy. If one insured's operations is such that there is a risk of gradual property damage and a substantial claim, insurers will increase the premiums charged to all other purchasers of CGL insurance who are in the same business. Why should another insured bear that burden by paying higher premiums when his operations do not carry such an "expensive" risk?[280] Accordingly, standard form coverage was limited to sudden accidents.

Another concern was whether the insurer should cover liability for gradual property damage. There was a "moral hazard" associated with gradual property damage.[281] The insurers felt that more often than not, gradual property damage was caused by gross indifference to public safety, irresponsible and wilful conduct. Surely premising coverage for property damage liability on an accident, a sudden, and unintentional event, would eliminate this moral hazard. Canadian courts have largely ignored this moral hazard and permit a considerable degree of recklessness before the event causing the damage is characterized as a non-accidental or intentional act. What follows is an attempt to describe the way Canadian courts view "caused by accident", with a preliminary note as to how Canadian courts approach the interpretation of "accident" in liability insurance policies.

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[279] Bean, G.L., *The Accident versus the Occurrence Concept*, [1959] Insurance Law Journal 550, at p. 551.

[280] The property and casualty insurers send there claims statistics to the Insurance Bureau of Canada and the Insurers' Advisory Organization. These bodies compile this information and provide the insurers with base premium rates for the various categories of insureds. For example, manufacturers and contractors are grouped together, and this category is given a base premium rate. The insurers use this premium as a guide and will increase it or decrease it according to, amongst other things, the square footage occupied by the insured, its gross revenues and the numbers of employees. It will also increase it according to its claims experience with a particular type of insured. This is what is alluded to here.

(a) "Caused by Accident"

(i) Sources used by the Canadian Courts to Interpret "Caused by Accident"

Courts that have interpreted "accident" in liability insurance policies, have looked, without discrimination, to decisions interpreting that word as it is used in statutes, life, property, and accident and sickness insurance policies. This is unfortunate. Liability insurance provides coverage for claims made by others. The transaction must be analyzed from the viewpoint of the insured to ascertain whether the circumstances which it set in motion constitute an accident causing damage to others. In life, property, accident and sickness insurance, the viewpoint of the person who receives the injury is examined. When this point was raised, albeit in reverse, in an attempt to persuade the Supreme Court of Canada not to follow decisions involving liability, life and property insurance claims when seeking a definition of "accident" in an accident and sickness policy, Mr. Justice Spence responded:

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[281] Ibid, at p. 552-553:

"Down through history man has been vying for the material things of this world. Property and property rights are fair game over which men have striven with one another. It is an accepted principle that everyone is entitled to use his talents as wisely and as shrewdly as he can, within the skeleton of protective laws, to gain for himself as large of the world's property rights as his ingenuity can manage....

The man with incentive to damage, or the man who risks damaging other people's property for his own advantage is risking censure less where he contemplates causing gradual damage rather than sudden or violent damage. Gradual damage is less easily traced to its source and less likely to attract adverse public notice. It can sometimes accumulate to severe proportions before it is detected. Frankly the insurers would not insure these gradual property damage exposures without first seeing what they were getting into in each case.

> The insured in both an accident policy and an indemnity policy seeks cushioning against the results of a risk. In an accident policy, he seeks a monetary sum which will cushion the expense caused by the injury to himself. In an indemnity policy, he seeks cushioning against a liability to pay the costs of injury to others. Surely, the word "accident" must be, apart from specific definitions in specific policies, similarly interpreted in both policies.[282]

Although this reasoning confuses the difference between direct loss and liability insurance, the fact remains that Canadian courts interpreting "accident" in CGL Policies, will look to life, property, and accident and sickness insurance policies as well as various statutory uses of the word "accident".

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[282] Mutual of Omaha Ins. Co. v. Stats, infra, n. 344, at p. 182 (87 D.L.R. (3d)). The Casualty Committee of the International Association of Insurance Counsel stated:

> "While the courts quite often use the decided cases in the accident field for authority in the public liability field, it is submitted that a difference in the purpose of the liability policy should bar such indiscriminate use of the accident cases."

"*Caused by Accident*" (1956), 23 Insurance Counsel Journal 33, at p. 37.

(ii) Whether "Accident" Includes Negligence on the Part of the Insured

The clear majority of Canadian courts have held "accident" to be a non-technical word, and interpret it according to its usual, popular, and ordinary meaning. Canadian courts often quote the words of Lord Justice MacNaughten in the 1903 English decision, Fenton v. J. Thorley & Co. Ltd:[283]

> ...the expression "accident" is used in the popular and ordinary sense as denoting an unlooked for mishap or an unintentional event which is not expected or designed.[284]

The earliest reported Canadian case to discuss the meaning of "accident" in a CGL Policy, was Canadian Indemnity Co. v. Andrews & George Co. Ltd.[285] In that case, the insured was in the business of manufacturing glue. It sold some of its product to the third party, a lumber company, which used it to make a considerable quantity of plywood. Unknown to the insured, the glue was defective. The third party had to sell the plywood at a reduced price, suffering a loss for which the insured was liable under the Sale of Goods Act.[286] Despite extensive investigation, the cause of the defect in the glue could not be identified. The insurer denied coverage to the insured. After settling with the lumber company, the insured brought an action for indemnity against its insurer. The insured's CGL Policy covered, amongst other things, "...damage to or destruction of property of others caused by accident."[287] The courts at all three levels discussed whether the property damage was caused by "accident".

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[283] [1903] A.C. 443, [1900-3] All E.R. Rep. 1161 (H.L.).

[284] Ibid., at 1165 (All E.R. Rep.). In 1935, Dysart J., of the Supreme Court of Canada, shared Lord McNaughten's view when he stated, without citing authority, "accident" as used in a casualty policy is an "unexpected and undesired" event: Century Indemnity Co. v. Northwestern Utilities Ltd., [1935] S.C.R. 291, [1935] 3 D.L.R. 35 (S.C.C.), at p. 38 (D.L.R.).

[285] [1953] 1 S.C.R. 19, [1952] 4 D.L.R. 690, [1952] I.L.R. 369 (para. 1-089) (S.C.C.); rev'g (sub. nom. Andrews & George Co. Ltd. v. Canadian Indemnity Co.) (1951), 4 W.W.R. 37, [1952] 1 D.L.R. 180, [1952] I.L.R. 247 (para. 1-056) (B.C. C.A.); rev'g [1951] 1 D.L.R. 783, [1951] I.L.R. 58 (para. 1-016) (B.C. S.C. T.D.).

[286] R.S.B.C. 1948, c. 294.

At trial, Farris, C.J.S.C., held that "accident" involves the idea of something unexpected and fortuitous (a chance happening), synonymous with "peril".[288] The defect in the manufacturing process was clearly a chance happening, fortuitous, and unexpected, therefore an "accident". The Court of Appeal upheld the trial judgment on this issue. The only source of public liability that could be anticipated by the insured when it applied for insurance was a defect in the manufacturing process. The insurance contract must be construed so as to apply to this contingency which in fact occurred.[289]

The Supreme Court of Canada agreed with the British Columbia Court of Appeal on this issue. Kerwin and Estey JJ. held that as the defective condition of the glue was "unexpected and undeserved", an accident occurred within the meaning of the policy.[290] Mr. Justice Rand, held that "accident" does not include "direct and expectable damages from the daily risks which is part of ... [the insured's]...business of production and sale to face and eliminate.[291] "Accident" is meant to cover "something fortuitous, unusual and unexpected, not, in the ordinary course guarded against"[292]-- possibilities difficult if not impossible to foresee. Cartwright and Kellock JJ. were silent on this issue.

Of the seven judges who expressed an opinion, two, one at trial and one at the Supreme Court of Canada, held that an accident is a fortuitous event, unexpected and undesired, covering possibilities difficult if not impossible to foresee.[293] Three judges at the Court of Appeal stated that "accident" must apply to those liabilities apprehended by the insured at the time the insuring contract is formed.[294] Two justices of the Supreme Court of Canada simply held that an accident is an unexpected and undesired event.[295]

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[287] Supra, n. 285, at p. 691 ([1952] 4 D.L.R.).
[288] Ibid., at p. 784 ([1951] 1 D.L.R.).
[289] Ibid., at pp. 183-184 ([1952] 1 D.L.R.).
[290] Ibid., at p. 692 ([1952] 4 D.L.R.).
[291] Ibid., at p. 696.
[292] Ibid.

Although Andrews & George[296] was decided on other grounds,[297] it appeared that "accident" in liability insurance policies was virtually synonymous with "inevitable accident". If upheld, this would result in a liability policy affording minimal protection at best. In 1962, the court in R.D. McCollum Ltd. v. Economical Mutual Insurance Co.,[298] disagreed with this proposition. It stated that the average person uses "accident" to refer to something that is not devoid of negligence, but on the other hand, something less than a deliberate wilful act.

It took several years for Canadian courts to be persuaded by this reasoning. As late as 1969, the Alberta Supreme Court Trial Division endorsed the proposition that "accident" does not include negligence on the part of the insured.[299] The catalyst that led to general acceptance of the proposition that "accident" encompasses negligence was the dissent of Freedman, J.A. in Marshall Wells of Canada Ltd. v. Winnipeg Supply and Fuel Company.[300] He pointed out that even though a mishap might have been avoided by taking more precautions, the event may still be an "accident". Negligence and accident are not mutually exclusive words.[301]

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[293] Farris, CJ.B.C. and Rand, J., respectively.

[294] Sloan, CJ.B.C., Robertson and Bird, J.J.A. (Robertson, J.A. delivered the opinion of the Court).

[295] Kerwin and Estey, JJ.

[296] Supra, n. 285.

[297] See Chapter 4, pp. 51-65 and Chapter 7, pp. 152-162.

[298] [1962] O.R. 850, 34 D.L.R. (2d) 386 (Ont. H.C.).

[299] Poole-Pritchard Canadian Ltd. et al v. Underwriting Members of Lloyd's (1969), 71 W.W.R. 684, [1970] I.L.R. 915 (para. 1-324) (Alta. S.C.T.D.).

[300] (1964), 49 W.W.R. 664, [1965] I.L.R. 655 (para. 1-131) (Man. C.A.); overruled by Canadian Indemnity Co. v. Walkem Machinery Ltd., infra, n. 302.

Mr. Justice Freedman's dissent was accepted by Macfarlane J. of the British Columbia Supreme Court in Straits Towing Ltd et al v. Washington Ironworks et al.[302] Developing Mr. Justice Freedman's argument, he pointed out that if an accident policy (meaning a liability policy covering losses caused by accident) did not cover damage caused by the insured's negligence, the object of the insurance would be frustrated. If this risk was not covered, what was insured?[303] Mr. Justice Berger commented on this decision in Prince George White Truck Sales Ltd. v. Canadian Indemnity Co.:[304]

> The law owes a decent respect to common sense. An accident is an accident. It seems to me against all reason to say on the one hand that "accident" is not a technical legal term, and then to say that a negligent occurrence is not an accident when anyone not a lawyer would say that it was. Reasonable foreseeability determines whether there has been negligence, it is not a test to determine whether there has been an accident. I think Freedman, J.A.'s judgment in Marshall Wells...is right. Macfarlane J. in Straits Towing... adopted the view of Freedman, J.A. So do I.

In Tiko Electric Co. Ltd. v. The Canadian Surety Co. Ltd.[305] the Ontario County Court echoed these comments by rhetorically asking, "what liability imposed by law demands such expensive protection if negligence is excluded"?[306] Since 1975, Canadian courts appear to have unanimously accepted the proposition that accident envisions negligence on the part of the insured.[307]

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[301] Ibid., at p. 665 (W.W.R.).

[302] (1970), 74 W.W.R. 228, [1970] I.L.R. 982 (para. 1-344) (B.C. S.C. T.D.); aff'd [1975] 5 W.W.R. 510, [1975] I.L.R. 1100 (para. 1-654) (B.C. C.A.); aff'd (Canadian Indemnity Co. Ltd. v. Walkem Machinery Ltd.) [1976] 1 S.C.R. 309, 3 N.R. 523, 53 D.L.R. (3d) 1, [1975] 5 W.W.R. 510, [1975] I.L.R. 1100 (para. 1-654) (S.C.C.).

[303] Ibid. at p. 231.

[304] [1973] 6 W.W.R. 228, [1970] I.L.R. 982 (para. 1-344) (B.C. S.C. T.D.).

[305] [1973] I.L.R. 750 (para. 1-573) (Ont. Co. Ct.).

[306] Ibid. at p. 752.

[307] For additional illustration of this proposition, see Avalon Consolidated School Board v.

(iii) Whether Reckless or Wanton Misconduct Causing Loss Constitutes Loss "Caused by Accident"

Before launching into a discussion of the cases in this area, it is useful to look at the approaches taken by the courts that have interpreted "accident" in insurance policies. Some policies insure against accidental injury, concentrating on the nature of the cause.[308] These policies force the courts to consider how the event occurred. Was the damage the result of a series of unintentional acts or was the damage the result of an unintentional consequence of an intentional act? For example, if the insured wore ill fitting shoes, resulting in blisters, which became infected, which in turn killed the insured, did the insured die by accidental means?[309] The death was unintentional, but the events causing the death were deliberate as the insured intentionally wore shoes that did not fit. However, what was the cause of death? It could be choosing the shoes, wearing them in unsuitable conditions, or tolerating the blister. This type of analysis is difficult to apply and plunges this area of the law "into the muskeg".[310]

McNamara Industries, Canadian Indemnity, Third Party (1974), 6 Nfld. & P.E.I.R. 375, [1975] I.L.R. 1064 (para. 1-649) (Nfld. S.C. T.D.).

[308] This distinction was recognized in two Supreme Court of Canada cases, Columbia Cellulose Co. v. Continental Casualty Co., [1964] S.C.R. v, 42 D.L.R. (2d) 401n, 46 W.W.R. 512, [1964] I.L.R. 581 (para. 1-119) (S.C.C.); aff'g (1963), 43 W.W.R. 355, 40 D.L.R. (2d) 297, [1963] I.L.R. 489 (para. 1-106) (B.C. C.A.); and Smith v. British Pacific Life Insurance Co., [1965] S.C.R. 434, 51 W.W.R. 417, 51 D.L.R. (2d) 1, [1965] I.L.R. 686 (para. 1-138) (S.C.C.); aff'g (1964), 48 W.W.R. 25, 45 D.L.R. (2d) 91, [1964] I.L.R. 582 (para. 1-120) (Sask. C.A.).

[309] These are the facts considered in Sloboda v. Continental Casualty Co., [1938] 2 W.W.R. 237 (Alta. S.C. A.D.). The court held that the insured did not die by accidental means as required by the policy. See the comments of the Alberta Court of Appeal in Leontowicz v. Seaboard Life Ins. Co. infra, n. 308.

[310] Leontowicz v. Seaboard Life Ins. Co. (1984), 36 Alta. L.R. (2d) 65, 58 A.R. 66, 16 D.L.R. (4th) 95, 8 C.C.L.I. 290, [1985] I.L.R. 7257 (para. 1-837) (Alta. C.A.); rev'g (1983), 48 A.R. 60, 28 Alta. L.R. (2d) 227, [1983] I.L.R. 6527 (para. 1-1696) (Alta. Q.B.), leave to appeal to the Supreme Court of Canada dismissed, June 13, 1985, at 36 Alta. L.R. (2d) 73.

The CGL policy does not require damage by "accidental means". It simply requires damage caused by accident. This point has often been overlooked by counsel advising as to coverage under the CGL policy. It is unfortunate as the CGL policy thus affords wider coverage than would be the case if the policy required the damage to be caused by accidental means. This permits the court to look at the result of a series of events to determine if the damage complained of is accidental. Rather than looking at accidental means, ask if the insured deliberately or intentionally ran the risk of the injury or damage. For example if the insured consumes alcohol, proceeds to drive, and runs the car into a brick wall, is the death accidental? Short of a finding that the insured knowingly and deliberately drove the car into the wall, one would have to conclude that the death was unintended, and in that sense "accidental". However, under the "accidental means" analysis, the death would not be accidental as the insured deliberately drank, and then chose to drive.

There are numerous provincial trial and appellate decisions as well as Supreme Court of Canada[311] decisions that analysed facts under the accidental result approach. The advantage to this analysis is that it incorporates cases that discuss whether the insured's criminal or wilful intent bring the transaction within the rubric of "accident".[312] It also permits discussion of those cases interpreting exclusions dealing with injury or damage caused intentionally by or at the direction of the insured.[313] These cases deal with the same issue: did the insured intentionally cause the loss for was it an accident? Under the accidental means analysis, these cases must be distinguished and the distinctions are often illusory.

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[311] These decisions are discussed in this section.

[312] This refers to those cases discussing the applicability of the Uniform Rule, infra, n. 327.

[313] For example, see Co-operative Fire & Cas. Co. v. Saindon, infra, n. 336.

Although Canadian courts were reluctant to hold that "accident" encompasses negligence, they were relatively quick to accept the notion that the insured's reckless or wilful act, resulting in harm or loss to others, is not a negligent act, and therefore is not an "accident".

In Crisp v. Delta Tile & Terrazo Co.,[314] liability was imposed upon the insured, a contractor, for the escape of dust throughout the plaintiff's house as a result of its terrazo grinding operations in the basement. The insured and his workmen "knew beyond doubt what could be expected if appropriate measures were not taken to seal off that portion of the house where the work was being done."[315] Nonetheless, the basement doors and windows were left open. The Ontario Court of Appeal held that because the danger was appreciated, and no precautions were taken, their acts were not the result of human inattention. Rather, their acts constituted "a deliberate courting of the risk, with knowledge of the risk..."[316] Coverage was denied as the property damage was not caused by accident.

In Candler v. London & Lancashire Guarantee & Accident Co. of Canada Ltd.,[317] the insured attempted to demonstrate his nerve to a friend by perching on a balcony railing off of his thirteenth floor hotel room. He lost his balance and fell to his death. Grant J. was asked to decide whether the insured died by accidental means within the context of a life insurance policy. He stated that whether death occurs by accident or accidental means is determined by the foreseeability of the result flowing from the deceased's actions. The insured did not intend to fall. His intent was to demonstrate that he had the nerve to take the risk of falling. As this risk was present in his mind when he undertook the stunt that lead to his death, he did not die by accident or by accidental means.

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[314] [1961] O.W.N. 278, [1961] I.L.R. 228 (para. 1-046) (Ont. C.A.); rev'g [1961] O.W.N. 29, [1961] I.L.R. 142 (para. 1-029) (Ont. Co. Ct.).

[315] Ibid. at p. 229 (I.L.R.).

[316] Ibid. at p. 230.

[317] [1963] 2 O.R. 547, 40 D.L.R. 408, [1963] I.L.R. 537 (para. 1-110) (Ont. H.C.).

It followed from the Crisp[318] and Candler[319] decisions that if a wilful, deliberate act results in unintended consequences causing injury or damage, that injury or damage is not caused by accident..[320]

In Marshall Wells of Canada Ltd. v. Winnipeg Supply & Fuel Co. Ltd. et al.,[321] the insured, a contractor, helped to excavate a boiler room floor to install new heating equipment. A brick wall dividing a ramp from some boilers was removed. In the process of removing the wall, part of the ramp was broken off leaving the front legs of a supporting stand of a hot water tank some six inches short of the ramp's edge. The insured vigorously pointed out to his co-contractor, that it was dangerous to leave the tank unsupported. It was just a matter of time before it would fall over. The tank collapsed causing damage to the plaintiff's premises. The majority judgment, rendered by Guy J.A., held that the result was not an accident -- not a fortuitous and unexpected mishap, but a calculated risk that materialized.

Marshall Wells[322] is wrongly decided. The insured was involved in a dangerous operation, acknowledged the risk, and informed his co-contractor of the high probability of the risk occurring. He simply carelessly and negligently omitted to do anything about it. Carelessness and negligence does not constitute an intentional act.

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[318] Supra, n. 314.

[319] Supra, n. 317.

[320] See also: Pont et al v. Perth Mutual Fire Ins. Co. (1967), 59 W.W.R. 550 (B.C. Co. Ct.); Tiko Electric Co. Ltd. v. The Canadian Surety Co. Ltd., supra, n. 304; Avalon Consolidated School Board v. McNamara Industries et al, supra, n. 307.

[321] Supra, n. 300.

[322] Ibid.

Additionally, Guy J.A. held that where an insured persists in an activity, unaware of an associated risk, and that risk materializes, the resultant damage would not be accidental if the reasonable man in the circumstances would have expected the result. This ignores the concept that an accident encompasses negligence.[323]

Canadian Indemnity Co. Ltd. v. Walkem Machinery Ltd.[324] attempted to clarify this area by stating unequivocally what constitutes an accident. "The Straits Logger", a log barge, owned by one of the plaintiffs and chartered by another, was equipped with two cranes, designed and manufactured to load logs. The cranes were manufactured by an entity called Washington and distributed by the insured. The insured examined the cranes after they had been in use and made some repairs. One of the cranes collapsed after the insured repaired it. Judgment was rendered against the insured for 25 per cent of the damages that flowed from the crane collapse, as the insured "knew of the dangerous condition of the crane but nevertheless pawned off on an unsuspecting customer, an inadequately repaired piece of equipment."[325] Nonetheless, the report does not disclose that there was a finding that the insured knew that equipment would cause the type of damage that in fact occurred. The insured sought a declaration that this liability was covered under its CGL policy. Pigeon, J., giving the majority judgment in the Supreme Court of Canada, held that the liability was covered. In so doing, he stated that Marshall Wells[326] expressed "a wholly erroneous view as to the meaning of accident in a comprehensive business liability policy"[327] and thus overruled it. He stated:

> While it is true that the word "accident" is sometimes used to describe unanticipated or unavoidable occurrences, no dictionary need be cited to show that in everyday use the

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[323] See above, section 6.1(ii).

[324] Supra, n. 302

[325] Ibid, at p. 229 (74 W.W.R.).

[326] Supra, n. 300.

[327] Supra, n. 302, at p. 6 (53 D.L.R. (3d)).

> word is applied to any unlooked for mishap or occurrence...
> ...
> I wish to add that, in construing the word "accident" in this policy, one should bear in mind that negligence is by far the most frequent source of exceptional liability which a businessman has to contend with. Therefore, a policy which would not cover liability due to negligence could not properly be called "comprehensive". But foreseeability is an inessential element of such liability. If calculated risks and dangerous operations are excluded what is left but some exceptional causes of liability?[328]

Walkem[329] states that where the evidence indicates that the insured intended the hurt or loss that occurred, the event is not an accident. There must be some evidence of that intent. The fact that the insured was engaged in a dangerous operation, which would cause any reasonable person in the position of the insured to immediately appreciate the risk run and take precautions to eliminate that risk is irrelevant. An accident is any "unloooked for mishap or occurrence"--an unintended event.

Mr. Justice Pigeon drew strength for this conclusion from cases interpreting the Uniform Rule of Public Policy (Uniform Rule), found in Insurance Acts of the common law provinces:[330]

> Unless the contract otherwise provides, a violation of any criminal or other law in force in the province or elsewhere does not, *ipso facto,* render unenforceable a claim for indemnity under a contract for insurance except where the contravention is committed by the insured, or by another person with the consent of the insured with intent to bring about the loss or damage.

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[328] Ibid. As noted in Chapter 1, p. 2, the policy was called the *comprehensive* general liability policy because it is a blend of various coverages. "Comprehensive" is a technical term. In this passage, Pigeon, J., drew a coverage inference from the policy's name.

[329] Supra, n. 302.

[330] Insurance Act, R.S.A. 1980, c. I-5, s. 135; Insurance Act, R.S.B.C. 1979, c. 200, s. 101; Insurance Act, R.S.N.B. 1973, C. I-12, s. 2; The Insurance Contracts Act, R.S.Nfld. 1970, c. 178, s. 18; Insurance Act, R.S.N.S. 1967, c. 148, s. 8(2); The Insurance Act, R.S.O. 1980, c. 218, s. 95; Insurance Act, R.S.P.E.I. 1974, C. I-5, S. 106; The Saskatchewan Insurance Act, R.S.S. 1978, c. S-26, s. 121.

Pigeon, J. also stated that the test to determine if the Uniform Rule[331] applies is the same test which must be applied to determine if the occurrence is an accident or a crime barring coverage.[332]

Does this decision leave room for the Crisp,[333] and Candler[334] situations? Did Walkem[335] overrule the proposition that an occurrence is not an accident where the insured deliberately engages in conduct with foreseeable risks yet persists in them with knowledge of that risk, and the risk materialized? The answer to that question lies with two subsequent decisions of the Supreme Court of Canada.

Almost two months to the day after rendering the Walkem[336] decision, the Supreme Court of Canada discussed this issue, in Co-Operative Fire & Casualty Co. v. Saindon.[337] The insured, Mr. Saindon, and the plaintiff, Mr. Sirois, were neighbours. One July afternoon, the insured was mowing a portion of his lawn which adjoined Mr. Sirois' property. The insured saw Mr. Sirois and accused him of cutting down some branches of a tree on his property. Mr. Sirois denied this, but his son admitted to the dastardly deed. The insured walked over to the Sirois property, pushing the lawn mower with its motor running. The insured then picked up the lawn mower, held it shoulder high and directed it towards Mr. Sirois' face. Mr. Sirois attempted to protect himself from the revolving blades by putting his hands over his face. The fingers of his left hand were severed and his right wrist was cut. The insured then returned to his property with his lawn mower and continued to cut his lawn. The insured's explanation for his conduct was that he raised the lawn mower in Mr. Sirois' face to scare him. The trial judge accepted this explanation. Mr. Sirois was awarded special and general damages against the insured and the latter joined his homeowner's insurers as a third party seeking indemnity under the comprehensive personal liability portion of his policy.

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[331] Ibid.

[332] Supra, n. 302, at p. 7 (53 D.L.R. (3d))

[333] Supra, n. 314.

[334] Supra, n. 317

[335] Supra, n. 302.

[336] Ibid.

[337] [1976] S.C.R. 735, 4 N.R. 343, 56 D.L.R. (3d) 556, 4 A.P.R. 329, 10 N.B.R. (2d) 329, [1975] I.L.R. 1152 (para. 1-669) (S.C.C.); rev'g (sub. nom. Sirois v. Saindon) (1973), 7 N.B.R. (2d) 280, 44 D.L.R. (3d) 469, [1973] I.L.R. 862 (para. 1-597)(N.B. C.A.); rev'g the unreported trial judgment of Mr. Justice Pichette.

The insurers denied coverage on the basis of an exclusion, identical to exclusion (g) of the 1978 I.B.C. CGL model policy. This exclusion withdraws from the broad coverage grant of "liability imposed by law... because of bodily injury", "bodily injury "caused intentionally by or at the direction of the insured". The insurer's coverage denial was successful at trial, rejected on appeal and successful once again at the Supreme Court of Canada. Mr. Justice Ritchie, speaking for the majority of that Court, held that the insured intended to cause the third party's bodily injury, and hence the exclusion applied:

> "in my view the issue must be determined on the ground that *under the circumstances of this case*, the intentional act of...[Saindon]...in raising the lawnmower as he did was the 'cause' of the accident as that word is generally understood in the interpretation of policies of insurance. (Emphasis added)[338]

The Court drew an inference of intent from the facts and circumstances and seemed to ignore the trial court's finding that Saindon only intended to scare Sirois:

> It will be seen that I take the view that the personal damage sustained by Sirois was intentionally caused within the meaning of exclusion 6 in the policy and also that the insured's actions constituted a violation of the criminal law committed by him with intent to bring about loss or damage although the precise damage was not anticipated.[339]

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[338] Ibid. at p. 566 (56 D.L.R.(3d)).

[339] Ibid.

To say the least, the lawn mower was put to an unnatural use. The injury was caused by the tipping of the lawn mower and Mr. Sirois' gesture of self-protection. The fact that the lawn mower tipped should have been eminently foreseeable by the insured. Mr. Sirois' gesture flowed from this deliberate act. The circumstances persuaded the Court to find intent to cause the damage. The injury was determined to be deliberate, not accidental, and the policy does not apply.

Is there any difference between tipping a lawn mower in someone's face to scare them (Saindon)[340] and knowingly selling equipment that is inadequately and negligently repaired (Walkem)[341]? The Late Chief Justice Laskin immediately recognized the uncertainty the majority judgment in Saindon[342] would create. In his dissent in Saindon[343] he stated:

> Pigeon, J. made it clear...[in Walkem]...that...an occurrence would be an accident under the policy even though it was the result of a calculated risk or of a dangerous operation. It follows as far as this Court is concerned, that an act or omission which involves an operation from which injury or damage results cannot be said to be done or omitted with intent to cause the injury or damage in the absence of a specific finding that there was such intent.[344]

The specific facts of Saindon[345] governed the result. The Supreme Court of Canada viewed the entire transaction giving rise to the injury as a criminal assault.[346] The general rule in these cases is as stated by Laskin, C.J.C. in his dissent in Saindon.[347] A subsequent decision of the Supreme Court of Canada in Mutual of Omaha Ins. v. Stats[348] demonstrated that as far as the Supreme Court of Canada is concerned, the meaning of "accident" is as it stated in Walkem.[349]

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[340] Supra, n. 337.

[341] Supra, n. 302.

[342] Supra, n. 337.

[343] Ibid.

[344] Ibid, at 559 (56 D.L.R.(3d)).

[345] Ibid.

[346] See the comments of Creaghan, J., in Town of Newcastle v. Mattatall et al (1987), 25 C.C.L.I. 58 (N.B. Q.B.).

[347] Supra, n. 337.

Stats[350] involved an action by a beneficiary of an accident policy against the insurer for proceeds payable upon the accidental bodily injury or death of Mrs. Brown, the life insured. Mrs. Brown died when her car hit the side of a building. Chemical analysis performed after her death indicated that at some time prior to her death she must have consumed the equivalent of five pints of beer or seven and one half ounces of alcohol. Witnesses who were with her in the hours before her death stated that she demonstrated no signs of impairment and did not consume any alcohol in their presence. Just prior to the fatal accident she thumped a parked car as she left a driveway. Following that incident, one witness stated that she appeared vague and disoriented, but not impaired.

The trial court held that Mrs. Brown's death was not an "accident". She voluntarily undertook to drive while impaired and when she had to know it could cause her foreseeable harm.[351] Mr. Justice Blair of the Ontario Court of Appeal reversed the trial decision, holding on the basis of Walkem[352] that the reasonable man test for negligence as the test for accident had been firmly rejected by the Supreme Court of Canada. He went on to say that her conduct was dangerous and grossly negligent but that did not mean that she courted the risk of death. Accordingly, the collision must be considered an accident and her death the result of accidental bodily injuries. Mr. Justice Spence, speaking for the majority of the Supreme Court of Canada,[353] affirmed the judgment of Blair, J.A. He held that as none of the witnesses appreciated Mrs. Brown's impairment, she must not have either.[354] He concluded that her death was accidental. A person may be grossly negligent but not realize that his acts are negligent. If, as in Candler,[355] the person realized the danger and deliberately assumes that risk, then any resulting harm is not accidental.

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[348] [1978] 2 S.C.R. 1153, 87 D.L.R. (3d) 169, 14 N.R. 444, [1978] I.L.R. 1188 (para. 1-1014); aff'g (sub. nom. Stats v. Mutual of Omaha Ins. Co.), 14 O.R. (2d) 233, 73 D.L.R. (3d) 324, [1976] I.L.R. 367 (para. 1-816) (Ont. C.A.); rev'g (1975), 6 O.R. (2d) 734, 54 D.L.R. (3d) 29, [1975] I.L.R. 11041 (para. 1-655) (Ont. H.C.).

[349] Supra, n. 302.

[350] Supra, n. 348.

[351] Ibid, at p. 36 (54 D.L.R. (3d)). The trial judgment was rendered 18 days before the Supreme Court of Canada's decision in Walkem, supra, n. 302. Accordingly, the obvious inconsistency between the judgments can be excused.

[352] Supra, n. 302.

Neither the Ontario Court of Appeal nor the Supreme Court of Canada referred to Saindon[356], however the uncertainty created by that decision was removed by Stats.[357] In the latter case it was found that the insured did not appreciate her impairment. She therefore did not deliberately drive while intoxicated. Stats[358] does not conflict with Saindon.[359] In Saindon,[360] intent to cause the injury was found on the facts. In Stats[361] there was no evidence that the insured intended to drive while intoxicated and consequently it cannot be said that injury or death was a foreseeable consequence of her activity. As Spence, J., stated in Stats[362] "...[if]...the person realized the danger of his actions and deliberately assumed the risk of it, then...his actions could not be characterized as accidental."[363] This confirms the concept of accident described in Walkem.[364]

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[353] Mr. Justice Martland dissented. He held that Mrs. Brown must have been aware of her impairment, and hence the case was governed by the Candler, supra, n. 316.

[354] Supra, n. 348, at p. 180-181 (87 D.L.R. (3d)).

[355] Supra, n. 317

[356] Supra, n. 337.

[357] Supra, n. 348.

[358] Ibid.

[359] Supra, n. 337.

[360] Ibid.

[361] Supra, n. 348.

[362] Ibid.

[363] Ibid. at p. 183 (87 D.L.R. (3d)).

A case similar to Stats.[365] is Devlin v. Co-operative Fire & Cas. Co.[366] The insured and several friends had met at a bar on a Thursday evening in downtown Calgary to celebrate the insured's transfer to Edmonton. The mood was jovial. It was suggested that they leave and go to another bar in town. With that, the insured and six others got into the insured's car. The insured did not appear to be intoxicated. He sped out of the parking lot, and drove very fast and erratically down a major street, swerving in and out of traffic. It was just getting dark, traffic was moderately heavy and shoppers were leaving the stores at the usual 9:00 P.M. closing. The passengers in the car yelled at him to stop. He completely ignored them and turned up the radio louder and louder until it reached its maximum. At that point he began to sing. The more frightened the passengers became, the louder he sang. The wild erratic ride terminated with a collision. One of the passengers was seriously injured. The passenger brought action against the the insurers of the driver under the incontestability provisions of the auto portion of the applicable insurance Act. The insurers defended on the grounds that the injury was caused because of the insured's criminal act and that all recovery under the policy was barred by the Uniform Rule.[367]

The court held that the insured was "showing off", and may well have intended to frighten his passengers. He drove in a manner that was dangerous to himself, his passengers and other users of the street. His conduct was reckless, wanton, and amounting to criminal negligence causing injury. The issue is whether he violated the criminal law with the intent to bring about the injury within the meaning of the Uniform Rule.[368] It was held that there was no proof of the necessary intent, and the passenger was entitled to the policy proceeds.

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[364] Supra, n. 302.

[365] Supra, n. 348.

[366] (1978), 11 A.R. 271, 7 Alta. L.R. 155, 90 D.L.R. (3d) 444, [1978] I.L.R. 1298 (para. 1-1038) (Alta. S.C. A.D.); rev'g (1977), 6 A.R. 304, 3 Alta. L.R. 212, 78 D.L.R. (3d) 102, [1977] I.L.R. 781 (para. 1-908) (Alta. S.C. T.D.). Leave to appeal by the Alberta Supreme Court Appeal Division to the Supreme Court of Canada under the Supreme Court Act, R.S.C. 1970, c. S-19, s. 38, refused (1978), 13 A.R. 18 (Alta. S.C. A.D.).

[367] Supra, n. 330.

Devlin[369] is consistent with Stats.[370] If the passengers did not realize the driver was intoxicated, he must not have appreciated it either. There was no evidence that he assumed the risk of driving while impaired and the attendant risk of injury and damage.[371]

Thomas v. Wawanesa Ins. Co.,[372] is an example of a non-accident situation where the insured engaged in a deliberate act and knew that the damage that occurred was likely to occur. In Thomas,[373] an insured sued his auto insurer to recover proceeds payable under the collision coverage portion of his standard auto policy. The insured could succeed if he could persuade the court that the damage to his car was caused by an accident. One of the grounds which persuaded the insurer to withhold payment was that the insured was committing a criminal offence at the time of the loss "with intent to bring about loss or damage" within the meaning of the Uniform Rule.[374] At about 2:00 A.M. a Dartmouth police officer noticed the insured's vehicle was speeding. He pursued it in a marked police car. In the course of the pursuit speeds were reached of 90 to 100 kmph in a 50 kmph zone and a maximum of 130 kmph on a four-lane divided highway. The insured lost control and crashed into a utility pole. He testified in cross-examination that he realized he could crash his car traveling at that rate of speed. The Nova Scotia Court of Appeal agreed that the test under the Uniform Rule[375] was the same as the test for accident. Recovery was barred on the basis of this rule and on the basis that the damage was not caused by accident. The insured did not deliberately drive into the utility pole. However, he deliberately courted the risk of a crash of some sort. The collision was not unusual or unexpected.

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[368] Ibid.

[369] Supra, n. 366.

[370] Supra, n. 348.

[371] A further example is The Town of Newcastle v. Mattatall et al, supra, n. 346.

[372] (1982), 52 N.S.R. (2d) 86, 106 A.P.R. 86, 139 D.L.R. (3d) 56, rev'g 47 N.S.R. (2d) 278, 90 A.P.R. 278. Other cases supporting this analysis are: Johnson v. Mutual of Omaha Ins. Co. (1984), 45 O.R. 676, 8 D.L.R. (4th) 640 (Ont. C.A.), aff'g (1982), 39 O.R. 559, 139 D.L.R. (3d) 358, [1982] I.L.R. 6098 (para. 1-1586) (Ont. H.C.), leave to appeal to the Supreme Court of Canada, refused, May 22, 1984; Avalon Consolidated School Board v. McNamara Industries Ltd. et al, supra, n. 307; Trynor Construction Co. Ltd. v. Canadian Surety Co. (1970), 1 N.S.R. (2d) 599, 10 D.L.R. (3d) 482, [1970] I.L.R. 1033 (para. 1-356) (N.S. C.A.); Warren v. Marine Office of America Corp. and Dominion Insurance Corp. (1984), 57 N.B.R. (2d) 68, 148 A.P.R. 68; Turner v. Co-Operative Fire & Cas. Co. (1983), 58 N.S.R. (2d) 1, 123 A.P.R. 1, 147 D.L.R. (3d) 342, [1984] I.L.R. 6680 (para. 1-1735) (N.S. S.C. A.D.); Dunphy v. Canadian Indemnity Co. (1982), 44 N.B.R. (2d) 471, 116 A.P.R. 471, [1983] I.L.R. 6220 (para. 1-1621) (N.B. Q.B.).

[373] Supra, n. 372.

The evidence was stronger in Thomas[376] than in Devlin.[377] In the former case there was evidence that the insured appreciated the risk he was running. That was not the situation in the latter case.

To conclude, Walkem,[378] Saindon,[379] and Stats[380] indicate that an occurrence causing injury or damage will not be considered an accident if the insured specifically intended to bring about the loss or damage,[381] or "if the actor, understanding the risk of that result, deliberately courts it by proceeding with a dangerous act".[382] Stated positively, reckless and careless conduct resulting in injury or damage will constitute "property damage caused by accident" unless there is evidence that the insured intended to act in a manner where the damage suffered would be the likely result. The best examples of non-accident situations are Crisp,[383] Candler,[384] and Thomas.[385] In those cases the insureds realized the danger of their conduct and courted the risk of that danger materializing. The resulting damage was neither unusual nor unexpected.

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[374] Supra, n. 330.
[375] Supra, n. 330.
[376] Supra, n. 372.
[377] Supra, n. 366.
[378] Supra, n. 302.
[379] Supra, n. 337.
[380] Supra, n. 348
[381] per Laskin, C.J.C. in dissent in Saindon, supra, n. 337; Pigeon, J., in Walkem, supra, n. 302; Portland Masonry v. Casualty Co. of Canada (1984), N.S.R. (2d) 10, 152 A.P.R. 10 (N.S. S.C. T.D.).
[382] per Blair J.A., in Stats, supra, n. 348, at p. 328 (73 D.L.R. (3d)); see also Aylesworth, J.A., in Crisp, supra, n. 314; Grant, J., in Candler, supra, n. 317, Spence, J., in Stats, n. 348; Macdonald, J.A.,

Canadian courts have eroded much of the insuring intent behind the phrase "caused by accident". Deliberate, reckless and careless conduct resulting in property damage will constitute "property damage caused by accident" unless there is a finding of intent to cause that loss or a realization and assumption of the risk of that loss. As one commentator stated:

> ...it appears that courts, more and more, are moving toward the view that insurance contracts are mainly for the protection of accident victims and only incidentally for the protection of the party who buys the insurance.[386]

(b) Accident and the Element of Suddenness

The underwriters felt that an "accident" was an unintended, unforeseen

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in Thomas, supra, n. 372.

[383] Supra, n. 314.

[384] Supra, n. 317.

[385] Supra, n. 372; see also Board of Education of the Long Lake School Division No. 30 of Saskatchewan v. Schatz, 49 Sask. R. 244, [1986] 5 W.W.R. 355, 18 C.C.L.I. 232 [1986] I.L.R. 8158 (para. 1-2109) (Sask. C.A.) (aff'g) 33 Sask. R. 18, 6 C.C.L.I. 1, [1984] I.L.R. 1-1824 (Sask. Q.B.).

[386] Bean, supra, n. 279, at p. 557-558.

event, and had an additional element of suddenness.[387] The element of suddenness was very important as losses that occurred over an extended period of time were more often more costly than those that occurred suddenly. Insured could purchase an endorsement for an additional premium which would overcome this need for suddenness. For example in Foreman v. Jordan,[388] the court agreed with the insurers that the policy did not cover damage caused by termites and stated:

> In the ordinary meaning of the term...'accident' refers to 'some sudden and unexpected event taking place without expectation, upon the instant, rather than something which continues, progresses, or develops'...Whatever may be the meaning of the term in the context of other insuring agreements, in five out of six of the present policies...issued by Hartford in this record, such a distinction is plainly recognized; for by special endorsement in each of them, issued for an additional premium, liability for damages for bodily injuries (but not for property damage) was extended to cover those caused by "occurrence" instead of 'accident', 'occurrence' being more broadly defined as also a 'continuous and and repeated exposure to accidentally caused conditions'...or as 'continuous or repeated exposure to conditions'.

Unfortunately from the point of view of the insurers, not all courts agreed with this reasoning. Some felt that it was irrelevant whether the bodily injury or property damage was caused by accident. An example is Beryllium Corp. v. American Mutual Liability Ins. Co.[389] The insured processed the mineral beryllium. The wife of one of the insured's employees, and the daughter of another, died of beryllium poisoning contracted through the handling of work clothes over periods of five and eight years respectively. The court held that the insured's liability to the estates of the deceased women, was "caused by accident", as the insured could not have foreseen and did not intend the women to absorb the toxic particles into their lungs.

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[387] German, *The New Comprehensive General Liability Policy*, speech No. 131, 1967, available through the Defense Research Institute Inc., at p. 25. What follows under this title is a summary of his comments found as pp. 22-25.

[388] 131 So. 2d 796 (La., 1961); see also United States Fidelity & Guarantee Co. v. Briscoe, 239 P. 2d 754 (Ok.).

[389] 223 F. 2d 71 (3rd, Cir., 1975). See also Guerdon Industries Inc. v. Fidelity & Casualty Co., 123 N.W. 2d 143 (Mich.).

The insurers recognized that "accident" was out of step with the thrust of judicial authority. In 1966 the American model policy was amended by introducing the concept of "occurrence" to standard form coverage. The result was that all insureds received protection for gradually caused injury or damage for the same premium. The Canadian standard form was similarly amended.

6.2 OCCURRENCE

(a) The 1966 Policy Wording: Injurious Exposure to Conditions

The 1966 American standard form CGL Policy deleted "accident" from the coverage agreements. "Bodily injury" and "property damage" were recoverable if caused by an "occurrence" defined as:

> "Occurrence" means an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

One commentator stated in 1966:

> In jurisdictions where the court did not require the element of

> suddenness for the finding of an accident, all insureds had the coverage which was extended by the occurrence endorsement. The only difference was that some paid for it and some did not. Under the new policy, all have the coverage and all pay the same premium.[390]

The 1966 revisions extended coverage:

> The intentional aspects of "accident" were also clarified under this revision: Two factors must be considered in connection with this definition; one involves intent, and the other foreseeability. Whether intention is or is not involved ordinarily does not present special problems although it must be pointed out that while an insured's act might appear to be intentional, he may be incompetent to form such an intent. Further, instances arise where the injury is an unintended result of an intentional act. The two situations, an absence of intent or an unexpected result would be covered under either the "accident" or "occurrence" definition.[391]

Accordingly, the cases considered above regarding the intentional aspects of "accident" would be applicable to the 1966 definition of "occurrence".

One of the problems of insuring gradual property damage is that it may occur over several policy periods. Assuming different insurers covered the insured during the time the damage was occurring, how do you allocate the liability? This problem was also addressed by the revision:

> The language also limits the liability of the carrier to the bodily injury or property damage which occurs *during the particular policy period*. Therefore, if the insured should change carriers and the injurious exposure to conditions extended through the periods covered by both policies, each carrier would only be liable for that amount of damage which accrued during the policy period covered by his policy.[392]

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[390] German, supra, n. 387, at p. 23.

[391] Obrist, W.J., "*New Comprehensive General Liability Insurance*", 1974:1, D.R.I. Monograph, General Liability Insurance--1973 Revisions 38, pp. 39-40.

[392] German, Edward C, "*The New Comprehensive General Liability Policy*", unpublished paper presented to the Alabama, Mississippi and Tennessee Defense Lawyers Association Meeting, April 13-14-15, 1967, at Biloxi, Miss., available through the Defense Research Institute.

"Accident" was incorporated into the definition of "occurrence" to address two issues. Firstly, it helped to ascertain policy limits:

> The word "accident" had been retained to clarify the intent with respect to the time of coverage and the application of the policy limits to a particular occurrence. For example, the liability of a contractor arising out of the derailment of 10 to 12 freight cars caused by a collision with a piece of equipment would be subject to one application of the occurrence limits of the policy. Retention of the word "accident" is limiting in this sense and in no other.[393]

Secondly, "accident" was retained in order to preserve the case law which held that property damage must be caused by a fortuitous event in order for the policy to provide coverage:

> Nearly all courts have agreed that inherent in the phrase "caused by accident" is the element of fortuity. The happening must have been unforeseen, unexpected and unintended....It is not enough that that happening is not intended--it must also be unexpected or unanticipated. This, too, has been gradually recognized by the courts...On the whole...the underwriters fared rather well in sustaining the element of fortuity by the use of "caused by accident". The question arises, has fortuity been eroded by the change to "caused by an occurrence"? The answer should logically be "no". First, note that the word "occurrence" is defined to mean an "accident", which in turn includes...[the definition of occurrence] ...The word "accident" is deliberately retained to carry with it the established case law on fortuity. The "suddeness" may be removed from "accident" by the words that follow it, but not fortuity.[394]

American courts asked to interpret the 1966 definition of occurrence, disagreed as to whether the selected wording, "injurious exposure to conditions", was effective to extend coverage to gradual or repeated conditions resulting in property damage or bodily injury. An example is Kisle v. St. Paul Fire and Marine Co.[395] In that case, a claim was made against the insured for its failure, in breach of its contract with the third party, to make timely repairs to a sprinkler system, which caused crop damage to the third party. The court reached the correct result in holding that the claim was not covered as the damage was not unexpected from the standpoint of the insured. This was true; however, the court also stated that as the crop damage occurred over a period of time the claim was not covered as it was not caused by a sudden event. Once again, a policy revision was mandated. This was done in 1973.

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[393] Obrist, supra, n. 391, at p. 39.

[394] Tinker, George, H., "*Comprehensive General Liability Insurance--Perspective and Overview*" (1975) 25:3 Federation of Insurance Counsel Quarterly, 217 at p. 257-258.

[395] 495 P. 2d 1198 (Ore., 1972). See Tinker, supra, n. 394, at pp. 256-257.

(b) The 1973 Policy Wording: Continuous or Repeated Exposure to Conditions

In order to "prevent occasional misinterpretations that coverage is contingent on ...[the]...suddeness of the damaging event,"[396] the definition of "occurrence" was revised as follows:

> "occurrence" means an accident, including continuous or repeated exposure to conditions which results in **bodily injury** or **property damage** neither expected nor intended from the standpoint of the **insured**

This revised definition is, in all material respects, identical to the standard form I.B.C. "occurrence" endorsement.

This revision clarified the insuring intent as to suddenness, and dropped the word "injurious":

> The elimination of the word "injurious" from the definition

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[396] Reichenberger, A.E., *"The General Liability Policies--Analysis of the 1973 Revision,"* 1974:1 D.R.I. Monograph, General Liability Insurance--1973 Revisions, 5 at p. 10.

> of "occurrence" indicates that the conditions to which the exposure occurs need not be intrinsically dangerous. This change indicates a broadening of coverage to include a greater variety of conditions.[397]

The revised definition clearly defined the application of the policy limits, and when coverage commenced. A related series of events stemming from the same factor constitute one occurrence, and the policy limits are not to be multiplied. This was the insuring intent behind the 1966 policy wording.[398]

To date, there are very few American decisions and no reported Canadian cases interpreting "repeated exposure to conditions". The cases do indicate that the damage for which indemnity is sought must result from an "exposure" to continuous or repeated conditions.

The United States Court of Appeals has held that a sale constitutes an "exposure". In Champion International Corp. v. Continental Casualty Co.,[399] the insured sold, amongst other things, vinyl-covered paneling to manufacturers of houseboats, house trailers, motor homes and campers. Not long after the panels were installed, they began to delaminate. The court rejected the insurer's argument that the third party's property was not exposed to conditions that were continuous or repeated, holding that:

> Exposure there was, when...[the insured]...sold the paneling, and during this process, it was continuous and repeated. There is no dispute that damage resulted that was unintended.[400]

The insured's activities or product need not be the condition that produces the property damage. It is sufficient if the insured's product or activities allow other conditions to cause the damage. In Stauffer Chemical Co. v. Insurance Co. of North America,[401] the insured manufactured a product known as Captan 4 Flowable, designed to protect potato seed pieces against "seed rot" and "damp off". Relying upon representations that the product would protect against these conditions, various third parties purchased it, and used it according to the insured's instructions. The product proved to be ineffectual and substantial damage caused by "seed rot" and "damp off" resulted. The insurer denied coverage on the grounds that the "conditions" that caused the injury were the insured's product, which merely failed to prevent the damage from occurring. The court rejected this argument, holding:

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[397] Ibid, at pp. 10-11.

[398] Ibid.

[399] 546 F. 2d 502 (2nd Cir., 1976).

[400] Ibid.

> ...there is nothing in the definition of the term "occurrence" nor is there language anywhere else in the policy which prescribes what or who must cause the injury or destruction of property.[402]

(c) Conclusion

Under the 1978 I.B.C. model CGL policy, property damage as defined is recoverable where it is "caused by accident". It has been seen that this covers events that are sudden and fortuitous in the sense that the insured neither intended to cause the damage, nor anticipated or expected that it would occur. As a result, coverage for property damage is keyed to an event that is sudden and fixed in time and place.

The I.B.C. property damage occurrence endorsement, which may be added to the CGL Policy at an additional premium, extends the basic property damage coverage. This is why an additional premium is required. Under this endorsement, all aspects of accident previously discussed are retained, except the element of suddenness. That element is removed "to the extent that the injury or damage results from continuous or repeated exposure to conditions."[403] Consequently property damage that is neither intended, expected, designed, nor anticipated from the standpoint of the insured, is recoverable where it is caused suddenly, by a single event, or gradually over a period of time.[404]

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[401] 372 F. Supp. 1303 (S.D. N.Y., 1973).

[402] Ibid. at p. 1305.

The remaining issue related to "accident" and "occurrence" is when does an "accident" or "occurrence" occur?

6.4 THE REQUIREMENT THAT THE DAMAGE MUST OCCUR DURING THE POLICY PERIOD AND WITHIN THE POLICY TERRITORY

The 1955 American CGL model policy contained the following policy wording:

> Policy Period, territory. This policy only applies to accidents which occur during the policy period within the the United Sates of America, its territories or possessions or Canada.

This wording lead to confusion. Where does an accident occur when the causative act and the resulting damage are separated in time and space? As the policy did not refer to damage caused by *accidental means* , but simply "caused by accident", this should not have resulted in interpretative difficulties. The policy language requires one to look to the resulting damage and determine if that damage was intentional or accidental. It is an accident even though it is the unforeseen result of a deliberate act. The accident thus occurs where the unlooked for or accidental result, the damage complained of, occurs. Unfortunately, counsel sometimes failed to note this distinction. Occasionally, they advised insurers and insureds that the causative act is the event that triggers coverage and the situs of the act is where the damage occurs. This is not the case. The situs of the damage is what triggers coverage. This confusion is what separated the parties in Pickford and Black Ltd. v. Canadian General Insurance Co.[405]

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[403] Tinker, supra, n. 392, at p. 259.

[404] Southern Maryland Agricultural Assoc. Ltd. v. The Bituminous Cas. Corp., 539 F. Supp. 1295 (D. Md., 1982).

In that case, the insured, a stevedoring company, contracted with the owners of a ship to load and stow the third party's cargo, at the Halifax Harbour. The loading was completed to the satisfaction of the ship's master and port warden. The ship then sailed from Halifax Harbour on the afternoon of February 26, 1965. Sometime during the night and early morning of February 27, 1965, the cargo shifted, and was damaged. At the time of the shifting and consequent damage, the ship was outside the Halifax Harbour limits, and outside Canadian and American territorial waters.

The insured's liability to the third party was established by two decisions that went to the Supreme Court of Canada: Canadian General Electric Co. v. Pickford and Black,[406] respecting liability for defective stowage, and under the same style, another action respecting the interest allowable on the claim.[407] It was concluded that the cause of the damage was the faulty stowage on the part of the insured's employees.

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[405] [1977] S.C.R. 261, 7 N.R. 585, 64 D.L.R. (3d) 179, 11 A.P.R. 181, 14 N.S.R. (2d) 181, [1976] I.L.R. 81 (para. 1-732), [1975] 1 Lloyd's Rep. 267 (S.C.C.); aff'g 53 D.L.R. (3d) 277, 2 A.P.R. 245, 10 N.S.R. (2d) 245, [1976] I.L.R. 33 (para. 1-720) (N.S. C.A.); rev'g 42 D.L.R. (3d) 360, [1974] I.L.R. 907 (para. 1-610) (N.S. S.C. T.D.).

[406] [1971] S.C.R. 41, 14 D.L.R. (3d) 37, 2 N.S.R. (2d) 497 (S.C.C.).

[407] [1972] S.C.R. 52, 20 D.L.R. (3d) 432 (S.C.C.).

The insured brought this action against its insurer for indemnity under its policy of insurance. The policy in question was a personal injury, accident policy. However, for the same premium, it was extended by endorsement to cover property damage liability, the key phrase being:

> ...this policy is extended to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed by law upon the insured for damages because of injury to or destruction of property of any and every description *resulting solely and directly from an accident* due to the operations of the insured...[408] (Emphasis added)

It was agreed that the insurance provided under this endorsement did not apply to "risk at sea outside Halifax Harbour Limits."[409] The policy also stipulated that it would not apply to an "accident occurring outside the Dominion of Canada."[410]

The insurer argued that there was no coverage as the damage resulted from the shifting of the cargo which occurred outside the Dominion of Canada or alternatively, the Halifax Harbour Limits. The insured argued that the claim arose from negligent stowage which was an accident occurring inside the Halifax Harbour Limits, which later caused the cargo to shift when the vessel was outside Canadian territorial waters. Thus, the issue was whether an accident occurs when the causative act giving rise to damage at a later date is complete, or when the resulting damage occurs.

At trial, Mr. Justice Dubinsky, of the Nova Scotia Supreme Court Trial

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[408] Supra, n. 403, at 181 (64 D.L.R. (3d)).

[409] Ibid. at p. 182.

[410] Ibid. at p. 181.

Division, agreed with the insured's argument, holding that if one uses the common meaning of the word, the accident was the shifting of the cargo at sea. However, to correctly interpret "accident" in an insurance policy, the court must look at the cause and determine where the accident began. As the causative act began at dockside in Halifax Harbour, the accident occurred in Halifax Harbour. The court thus implied that "occur" is synonymous with "originate" as that word appears in the definition of "policy territory".

The Nova Scotia Court of Appeal reversed the trial judge's finding on this issue. Chief Justice MacKeigen held that the accident occurred at sea, and the insurers did not have to indemnify the insured:

> I think that the word "accident" as used in this policy means the event which resulted in the property damage. Applying the wording of the policy, the claim here is for damages because of injury to property, viz., the shifting of the cargo, "due to the operations of the Insured," viz., the stowage of the cargo at Halifax...I respectfully suggest that the origin or conceptual cause is logically very different from the occurrence, event or happening to which it gives rise or birth. One is cause and the other the unruly offspring. The shifting of the cargo originated in the act of stowage but did not happen or occur until the vessel was at sea about one week later.[411]

Mr. Justice Ritchie, speaking for the Supreme Court of Canada, agreed with the Nova Scotia Court of Appeal. He held that the shifting of the cargo at sea constituted an accident. Two days separated the cause and the effect. The policy uses the word "occur" and there is no doubt that the damage occurred at sea and that the damage was the result of an accident. Consequently, this accident occurred where the damage occurred: at sea. The insurer had no obligation to indemnify the insured:

> ...I am with the greatest respect unable to conclude that the accident at sea was so bound up with the negligence at the

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[411] Ibid. at pp. 282-283 (53 D.L.R. (3d)).

> dockside as to transform the latter from being the originating cause into being the event of which it is causative. Such a construction appears to rob the word "accident" as used in the policy of its natural and ordinary meaning by interpreting it as connoting not the "accident" but the cause of the accident.[412]

Pickford & Black[413] quite rightly decided that an accident *occurs* where the damage occurs, unless the cause is so bound up with the damage that the cause and damage are simultaneous. "Occurring" is divorced from "originating".[414]

In order to eliminate the controversy that spawned this type of dispute, the American model policy was amended in 1966. The Canadian model policy was similarly amended. Under the 1973 CGL model policy, the definition of "property damage" and "policy territory" were changed so that the property damage (as defined) rather than the accident must occur during the policy period and the policy territory before there is coverage:

> "property damage" means (1) physical injury to or

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[412] Ibid, at p. 184 (64 D.L.R. (3d)).

[413] Ibid.

[414] This does not conflict with Canadian Indemnity Co. Ltd. v. Walkem Machinery Ltd., supra, n. 302. The policy in question covered accidents *originating* during the policy period. The policy was issued for a three year period commencing March 10, 1963. In February of 1966, the insured repaired two pintle cranes on the third party's self-loading barge. These cranes collapsed after the policy expired. Although the damage occurred after the policy expired, the loss was covered as the policy simply required that the damage originate in the policy period.

A case which follows Walkem, supra, n. 302, is Portland Masonry Ltd. et al v. Casualty Co. of Canada et al, supra, n. 381. The insured, a contractor, began renovating a house on May 12, 1980. The renovations were finished May 14. At 12:01 A.M. May 18, the CGL policy issued by the Canadian Cas. Co. of Canada, expired. A new policy issued by the I.N.A. Insurance Co. commenced as soon as the other expired. Damage resulting from the renovations became visible after May 18. The court followed Walkem, supra, n. 302, and stated that the damage began during the period covered by Casualty's policy even though the damage continued during the currency of the I.N.A. policy. The court stated: "It is the carrier whose policy was in force at the time the complaining party was actually damaged that could be liable." (p. 13 N.S.R. (2d)). The report does not say whether the Casualty policy required the accident to originate during the policy period or occur in the policy period. If it was the former, the decision is correct. If it was the latter, the damage should have been apportioned between the two insurers.

Cansulex Limited v. Reed Stenhouse et al (1986), 70 B.C.L.R. 273, 18 C.C.L.I. 24, [1986] I.L.R. 8051 (para. 1-2090) (B.C. S.C. T.D.) considered facts very similar to those in Pickford and Black, supra, n. 402, against policy wording very different from the 1955 wording and the amended wording. Caution must be used when using this case to interpret the 1978 I.B.C. CGL model wording.

> destruction of tangible property which occurs during the policy period, including the loss of use at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by accident occurring during the policy period.
>
> IV **Policy Territory**
>
> This insurance applies only to **bodily injury** or **property damage** which occurs within the **policy territory**.

"Policy Territory" is defined in the policy shell:

> **"policy territory"** means:
>
> (i). Canada or the United States of America, its territories or possessions, or
>
> (ii) anywhere in the world with respect to compensatory damages because of **bodily injury** or **property damage** arising out of a product which was sold for use or consumption within the policy territory described in paragraph (i) above, provided suit for such compensatory damages is brought within such territory.

To conclude the 1978 I.B.C. CGL model policy states that the property damage (as defined) must occur during the policy period and within the policy territory (as defined) before there is coverage under the policy. If the damage occurs outside the policy period or outside the policy territory, there is no coverage.

When the occurrence endorsement is added to the 1978 I.B.C. CGL model Policy, coverage for property damage is contingent upon a finding that the damage occurred within the policy period and territory, as the endorsement does not modify the definition of "property damage" or "policy territory". There do not appear to be any Canadian cases interpreting the wording used in the I.B.C. occurrence endorsement. The American courts have addressed the issue and have unanimously held that the timing and place of the damage trigger whether an occurrence occurs within the policy period and territory.[415] It is likely that Canadian courts analyzing the issue will hold that rules regarding when and where an accident occur, apply with equal vigour to "occurrence".

6.5 CONCLUSION

"Accident" and "occurrence" are the corner-stones of coverage. If a court finds that a person insured under the policy causes property damage as defined to a third party, and that the insured is legally obligated to pay compensatory damages as a result, the policy will not necessarily apply. There must be a determination that the property damage was caused by an accident, or if the occurrence endorsement has been added, by an occurrence.

Underwriters originally wrote basic CGL coverage on an "accident" basis as it was thought the policy would only cover an unexpected or fortuitous event giving rise to sudden damage. Claims involving gradual damage were often expensive and it was felt that this type of damage should not be underwritten by standard form liability policies. Gradually some courts began to ignore the element of "suddenness". The result was that some insureds obtained coverage for gradual property damage and others did not. To correct this, the American standard form policy was changed. Coverage is now dependent on an "occurrence" which by its terms states that coverage exists for gradual property damage. This type of coverage is still not standard form coverage in Canada. Under the 1978 I.B.C. CGL policy, coverage is still premised on an accident occurring. Coverage is available on an occurrence basis; however, the insured must purchase an additional endorsement. Although gradual property damage is now covered under the occurrence wording, the damage must be unintended or unexpected--a fortuitous event occurring over a period of time.

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[415] For example, see State of Arizona v. Glens Falls Ins. Co., 609 P. 2d 598 (Ariz., 1980). See also, Berg, Arthur P., "*Occurrence": An Elusive Description*", D.R.I. Monograph, Occurrence and other Insurance Coverage Issues, 1982, Vol. 2, p. 2 at pp. 3-4.

As coverage written on an "accident" basis is still available in Canada, and as the "occurrence endorsement" retains "accident" in its definition, it is necessary to know what the courts judge to be an "accident". Judicial treatment of "accident" indicates that the courts do not judge the insured by the standards of the prudent man. They engage in a highly subjective analysis to determine if an "accident" has occurred. Unless there is a finding that the insured intended the result, or "if the actor, understanding the risk of that result, deliberately courts it by proceeding with a dangerous act",[416] the event giving rise to the property damage is an "accident". Although this is an extremely broad definition of "accident", it is impossible to define it in other terms. If one said that damage was not "accidental" where the insured appreciated the risk of damage and failed to do anything to avert it, one would exclude most liability situations. The only possible way to define "accident" is on the basis of intent. Consequently, the inquiry must be based on the subjective rather than the objective intent of the insured.

Under the current policy wording, it is no longer necessary to determine when and where the accident occurred to determine the policy period. The proper question is whether the damage occurred during the policy period and within the policy territory. If this is the case, then the policy applies, subject to the exclusions, conditions and endorsements.

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[416] per Blair J.A., in Stats, supra, n. 348, at p. 328 (73 D.L.R. (3d)); see also Aylesworth, J.A., in Crisp, supra, n. 314; Grant, J., in Candler, supra, n. 317; Spence, J., in Stats, n. 348; Macdonald, J.A., in Thomas, supra, n. 372.

Chapter 7

Exclusion (a): The Contractual Liability Exclusion

Exclusion (a), the contractual liability exclusion, provides:

> This insurance does not apply to:
>
> (a) liability assumed by the **Insured** under any contract or agreement except an **incidental contract**, but this exclusion does not apply to a warranty of fitness of quality of the **Named Insured's Products** or a warranty that work performed by or on behalf of the **Named Insured** will be done in a workmanlike manner.

"Insured", "incidental contract", "named insured's products", and "named insured" are defined in the policy shell. "Incidental contract" is defined as follows:

> "**incidental contract**" means any written agreement which is a lease of premises, easement agreement, agreement required by municipal ordinance, sidetrack agreement or elevator maintenance agreement.

"Named Insured's products" is defined as follows:

> "Named Insured's products" means goods or products manufactured, sold, handled or distributed by the **Named Insured** or by others trading under his name, including any container thereof (other than a vehicle), but shall not include a vending machine or any property other than such container, rented to or located for use of others but not sold.

This exclusion refers to two entirely different things. Firstly, it refers to a contract entered into prior to the loss, the breach of which gives rise to a cause of action. This is examined here. Secondly, it refers to an assumption of liability toward injured persons following an accident. The latter deals with the breach of the cooperation clause found in the conditions section of the policy shell, and is beyond the scope of this work.[417] The first section of this chapter addresses the purpose of this exclusion. The remaining sections deal with the exceptions to the exclusion in the order they appear in the exclusion.

7.1 THE PURPOSE OF EXCLUSION (a)

It was learnt in Chapter 4 that Coverage Agreements A and B cover the insured's liabilities, whether they arise in contract, or in tort, or by reason of statute. Does exclusion (a) mean that all of the insured's contractual liabilities are excluded?

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[417] For an introduction to this area, see Appleman, *Insurance Law and Practice*, (Buckley ed.), para. 4780.

The exclusion is not intended to exclude all of the insured's contractual liabilities. The exclusion states, in part, that it applies to "...liability assumed by the Insured under any contract or agreement..." Although the exclusion could be read broadly to exclude all of the insured's contractually incurred liabilities, that is not how an exclusion is to be interpreted. Exclusions are to be read narrowly, in favour of the insured. Rejecting the broad interpretation in favour of a narrow one, one is left with the conclusion that the exclusion is directed against the assumption by way of contract of another's liabilities. Stated in other words, the exclusion is directed against the insured's agreement to hold another harmless. As one commentator has stated:

> ...the exclusion does not run to duties assumed by contract, or to liability by reason of contract, but to "liability assumed" by the insured under a contract. The exclusion therefore does not remove coverage simply because a claim is based on contract and not in tort.[418]

This exclusion is one of the least understood exclusions in the policy. It only does what it says it does, and it does not say that all of the insured's contractually assumed liability is excluded. The insured's liability under hold harmless agreements should be excluded because under these agreements, the insured assumes the legal obligations of another whose business the insurer does not know. Consequently, the insurer does not know the liabilities it may incur.

The insurer will permit the insured to insure his liability to another under hold harmless agreements by a separate Contractual Liability Coverage Rider or by a Contractual Liability Endorsement which is added to the CGL Policy. The former grants "blanket" coverage for the insured's contractual liability for third party bodily injury or property damage arising out of any contract that he might enter into. The latter is the most common form of contractual liability protection. The insurer will detail all contracts for which third party liability coverage is sought on the endorsement. Most insurers will require copies of the contracts covered by the endorsement so that they can assess the risks assumed by the insured, and charge an appropriate premium. Coverage for contractual liability in either one of these forms is extremely common. If one is reading a case report dealing with coverage under a CGL policy where the claim arises in contract, it would be wrong to immediately assume that exclusion (a) did not apply because the contractual liability was not "...liability assumed by contract..." There may have been a contractual liability endorsement or contractual liability rider which stated that exclusion (a) did not apply. It is not always indicated in case reports whether the insured had this type of protection.

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[418] Tinker, George H. *Comprehensive General Liability Insurance--Perspective and Overview*, (1975) 25:3 Federation of Insurance Counsel Quarterly, 217-318, at p. 265.

An excellent illustration of the type of hazard exclusion (a) is designed to meet is described by the facts in Foundation of Canada Engineering Corp. Ltd. v. Canadian Indemnity Co.[419]

By the terms of a contract with the owner of a project, the insured agreed to hold the project owner harmless from any and all liability arising from the design of all structures of a kiln building. It also assumed a specific obligation to check the work of P. Ltd. P. Ltd. had entered into a separate contract with the project owner to design and construct the precast and pre-stressed concrete portions of the building. Some months after the building was built, it collapsed. Two employees were killed. The collapse was caused by the "gross under-design"[420] of metal connections that connected the ends of a roof beam with two columns. This was P. Ltd.'s design error. The insured was at fault for failing to check P. Ltd.'s work.

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[419] [1978] 1 S.C.R. 84, 74 D.L.R. (3d) 266, [1977] 2 W.W.R. 75, [1977] I.L.R. 440 (para. 1-832), 15 N.R. 164 (S.C.C); aff'g [1974] 3 W.W.R. 23, 44 D.L.R. (3d) 298, 13 N.R. 282, [1974] I.L.R. 903 (para. 1-609) (Man. C.A.); allowing the appeal of Employers Ins. Co., and dismissing that of Canadian Indemnity Co., against Fenco, from an unreported decision of the Manitoba Court of Queen's Bench, the contents of which are summarized at 74 D.L.R. (3d) 267.

[420] Ibid., at p. 24 ([1974] 3 W.W.R.).

One of the issues that had to be decided was whether the insured's liability to the project owner was excluded by reason of an exclusion equivalent to exclusion (a). The insured's liability for its failure to check the work of P. Ltd. should not be excluded. The exclusion is not intended to cover this type of liability. However, the exclusion is intended to cover the insured's liability to the project owner under the hold harmless clause. The contractual relationship between the insured and the project owner was such that the insured, aside from its contractual duties, owed a tortious duty of care to the project owner, to check the work of P. Ltd. This tortious liability is caught by the hold harmless clause, and should also be caught by the exclusion.

The Manitoba Court of Appeal, whose judgment was confirmed by the Supreme Court of Canada, placed a different construction on the policy. It held that the insurers properly denied coverage for all of the insured's liabilities as an exclusion for "...third party liability assumed by the insured under contract..."[421] withdrew the claim from coverage.

Unfortunately, Canadian courts appear to be in agreement that this exclusion removes all of the insured's contractually assumed obligations from coverage, whether the insured assumes another's obligations or other obligations. The British Columbia Court of Appeal in Dominion Bridge v. Toronto General Insurance,[422] cited Canadian Indemnity v.

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[421] Ibid. at p. 29.

[422] [1963] S.C.R. 362, 40 D.L.R. (2d) 840, 45 W.W.R. 125, [1963] I.L.R. 535 (para. 1-108) (S.C.C.); aff'g (1962), 37 W.W.R. 673, 32 D.L.R. (2d) 374, [1962] I.L.R. 300 (para. 1-063) (B.C. C.A.); rev'g (1961), 34 W.W.R. 289, 27 D.L.R. (3d) 486, [1961] I.L.R. 123 (para. 1-025) (B.C. S.C. T.D.).

Andrews & George[423] for that proposition. Their decision on this point was confirmed by the Supreme Court of Canada. The Supreme Court of Canada re-affirmed this position in Foundation Canada Eng. Corp. v. Canadian Indemnity.[424] The law in Canada appears to be that exclusion (a) removes from coverage all contractually assumed liability which the insured incurs by reason of its contract with another.[425]

The question remains however, can an insured "assume" tortious obligations which it would bear even if the contract did not exist? Can it be said that the insured "assumes" its tortious obligations by affirming that it will honour them in a contract?

Dominion Bridge v. Toronto General Insurance Co.,[426] states unequivocally that if the insured stipulates in a contract that it will honour its tortious obligations, any liability arising from breach of those obligations runs afoul of exclusion (a).

In that case the insured contractor entered into a contract with a third party to erect the steel superstructure of a bridge upon masonry piers supplied by the third party. Clause 16 of that contract required the insured to assume all liability for loss or damage to any portion of the bridge structure, arising out of its faulty work or design. The falsework buckled due to faulty design, causing portions of the uncompleted superstructure to fall onto, and damage the third party's piers. The insurer stated that the insured's liability to the third party was withdrawn from coverage by an exclusion for "...liability or obligation assumed by the Insured under any contract or agreement..."[427] An action was brought by the insured to contest the coverage denial.

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[423] [1953] 1 S.C.R. 19, [1952] 4 D.L.R. 690, [1952] I.L.R. 369 (para. 1-089); rev'g (sub. nom. Andrews & George Co. Ltd. v. The Canadian Indemnity Co.), 4 W.W.R. 37, [1952] 1 D.L.R. 180, [1952] I.L.R. 247 (para. 1-056) (B.C. C.A.); rev'g [1951] 1 D.L.R. 783, [1951] I.L.R. 54 (para.. 1-016) (B.C. S.C. T.D.).

[424] Supra, n. 422.

[425] For a further example see, Cansulex Limited v. Reed Stenhouse et al (1986), 70 B.C.L.R. 273, 18 C.C.L.I. 24, [1986] I.L.R. 8051 (para. 1-2090) (B.C. S.C. T.D.).

[426] Supra, n. 422.

At trial, Collins, J., discussed the effect of clauses 16 and 18 of the contract. Clause 16 required the insured to repair any damage that it caused to any part of the project. Was this a tortious or contractual obligation? Had the insured "assumed" its tortious obligations so as to come within the scope of the exclusion? Collins, J., stated that the insured's liability to repair and restore the piers arose out of and because of its contract with the third party. It was not a liability arising out of tort. This liability was excluded from coverage.

Under Clause 18, the insured also guaranteed that its agents, workmen, and all other persons in its employ, and under its control would perform their common law duties. The insured guaranteed that it would be responsible for all damages caused by any breaches of duty of those persons for whom it was responsible, and would save the third party harmless from any liability that the plaintiff might incur as a result. Collins, J., stated that this clause did no more than bind the insured to perform its tortious obligations. The insured would have borne these obligations if the contract did not exist. This did not constitute an assumption of liability within the meaning of the exclusion.[428]

On appeal, Chief Justice DesBrisay of the British Columbia Court of Appeal, disagreed with Collins, J. Where the insured is liable in tort for damage to another, where the insured has assumed that liability in a contract with that person, and where there is an accident which would result in the insured being found liable in tort for the damage, that liability is excluded by exclusion (a), even though the insured would be liable in tort if the contract had not been in place. When faced with such a situation the contract must be analysed to determine if the insured has "assumed" a liability or an obligation in its contract. In this case he held that clauses 16 and 18 of the contract did not constitute an assumption of liability. However, the insured did assume liability for damage to the piers in the specifications to the contract, and consequently the insured's liability for the damage to the piers was excluded.[429]

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[427] Ibid. at p. 379 (32 D.L.R. (2d)).
[428] Ibid. at pp. 498-499 (27 D.L.R. (2d)).

Davey, J.A., took a different approach. The exclusion refers to an assumption of liability. To determine if the exclusion applies, one asks if the damage for which the insured is liable (in this case, damage to the piers) fits the terms of the exclusion. If it does, coverage for that liability is excluded.[430] In conclusion, he stated:

> The fact that the circumstances arising out of the performance of the contract may impose upon the contractor a general duty in law to take care to avoid injury to the property of others, breach of which duty will give rise to an action for damages in tort, is relevant to the question whether the claim falls within the insuring agreement, as one for which liability is imposed by law, but it is not relevant to the application of the Exclusion Clause, if otherwise the claim falls within the exception, by being one that arose out of an obligation assumed by contract.[431]

In the final analysis, to determine what liabilities are assumed, a court must analyze the contract to determine the allocation of risk: "the terms of the contract determine on whom the loss falls."[432] If the insured agreed with the third party to assume liability for a particular head of damage, that liability is not covered, even if the insured would have been liable for that damage at common law. Davey, J.A. concluded that the insured assumed liability for the third party's damage. He did not specify which clauses of the contract assumed that liability. The liability was excluded.

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[429] Ibid. at pp. 377-378 (32 D.L.R. (2d)).

[430] Ibid. at p. 385.

[431] Ibid. at pp. 387-388.

[432] Ibid. at p. 388 (32 D.L.R. (2d)).

Sheppard, J.A., concluded that the exclusion applied. The contract created the relationship upon which the insured's tortious liability arose.[433] By its contract, the insured agreed to assume this tortious liability.[434] He was not specific as to what particular clauses led him to this conclusion. The policy excludes all claims where the insured has assumed its tortious liability, even if he would have been liable for this liability independent of the contract:

> The question in every instance is whether the liability assumed under contract are one and the same loss; if so, that liability, though imposed by law, is excluded from the coverage.[435]

All three Justices of the British Columbia Court of Appeal concluded that the insured's liability to the plaintiff was withdrawn from coverage by the contractual liability exclusion. They held that one can agree by contract to assume one's tortious liability; liability that one would bear in any event. Where that is the case, exclusion (a) withdraws the insured's assumed liability from coverage.

The decision was appealed to the Supreme Court of Canada. Judson, J., speaking for the Court stated:

> The trial Judge held that the first exclusion clause only excluded liability arising from contract and not claims arising out of concurrent liability in tort. The Court of Appeal held that the liability in question had been assumed by ...[the insured]...under its contract... [with the third party]...and that it came squarely within the first exclusion clause and that

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[433] Ibid. at p. 393.

[434] Ibid.

[435] Ibid. at p. 394.

> it was immaterial that such liability was tortious liability independent of contract. "Liability imposed by law" and "liability assumed under contract" were for one and the same loss. That being so, liability, even though imposed by law, was excluded from the coverage...I agree with and adopt the unanimous opinion of the Court of Appeal on this point.[436]

In conclusion, Dominion Bridge[437] stands for the proposition that a stipulation in a contract with a third party, that the insured will honour its common law liabilities, is an assumption of liability which is removed from coverage by the contractual liability exclusion. There is no need to determine whether the insured's liability to the third party is tortious or contractual if the the insured has stipulated in the contract that it will honour its common law obligations. If the contract does not contain such a clause, the insured's tortious liability for the third party's loss will be covered, even though the insured's duty of care to the third party exists because of the contract.

Are there any implied limitations on the reach of this exclusion? Does it exclude liability to others who are not parties to the contract, incurred while the insured is performing its contract? Davey, J.A., while giving his reasons for judgment in Dominion Bridge,[438] stated that there is an implied limitation on the reach of the exclusion. It only applies to damage suffered by a party to the contract and for which the insured is liable.[439] In *obiter* he stated that there is some question in his mind as to whether the exclusion should be further restricted to damage to property directly involved in the contract. If restricted in this fashion, claims for damage to other property of a party to the contract would not be excluded.[440] He stated:

> In short, in order for the right to indemnity to be excluded

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[436] Ibid. at p. 842 (40 D.L.R. (2d)).

[437] Ibid.

[438] Ibid.

[439] Ibid. at p. 387.

[440] Ibid.

> from coverage by Exclusion 1...["...liability assumed by contract..."]...in circumstances such as these, the claim against the insured must be one made by a party to a contract for damage to his property caused by an act or omission of the insured in breach of his contractual obligations.[441]

If the insured stipulates in a contract that it will be liable for the negligence of its employees, and one of its employees injures someone other than the third party, with whom it has contracted, is that person's claim withdrawn from coverage by the contractual liability exclusion? The answer is "no". The contractual liability exclusion only applies to the insured's contractual liabilities which are enforced by reason of that contract. In Dominion Bridge,[442] Davey, J.A. stated:

> A claim by a member of the public, who was not a party to the contract under which the insured was doing work, for damage to his property caused by the insured's negligence in carrying out the work, would have its origin in the obligations assumed by the contract in the widest sense of that term; such a liberal interpretation would in this case exclude all claims...Obviously, some limitation is required. In my opinion the generality of the exclusion is restricted in two ways. First, the connection between the claim and the contract creating the liability or obligation that gives rise to it must be something more than a mere historical explanation of the circumstances that create the liability for the claim. There must be a reasonably close connection between the obligations and liabilities assumed by the contract and the claim itself...[443]

There are certain contracts that are excepted from the reach of the exclusion. There are certain types of contractual agreements which virtually every type of business operation must assume. These are the incidental contracts that are defined in the policy shell. Those insureds who sell or distribute goods and products must bear certain fitness warranties implied by provincial sale of goods legislation. The warranty of fitness is an exception to the exclusion. Insureds who perform construction and repair services often bear a warranty that their work will be done in a workmanlike manner. That warranty is excepted from the exclusion as well.

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[441] Ibid., at p. 387 (32 D.L.R. (2d)).

[442] Ibid.

[443] Ibid. at pp. 386-387 (32 D.L.R. (2d)).

7.2 THE INCIDENTAL CONTRACTS

Exclusion (a), read with the definition of "incidental contract", indicates that any liability for bodily injury or property damage which the Insured assumes by entering into a lease of premises, easement agreement, agreement required by municipal ordinance, a sidetrack agreement, or an elevator maintenance agreement, is exempt from the operation of this exclusion.

Most businesses lease their premises. Under most leases, tenants agree to hold their landlords harmless from any liability the landlord may incur because of the lease of premises. This liability is part and parcel of the lease agreement and is covered.

"Sidetrack agreement" refers to agreements for the use of a short railroad track or a track adjacent to a main track, to store idle freight cars, to pass trains that are located on the main track, and as a classification yard.[444]

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[444] New Orleans Terminal Co. et al v. Spencer, 255 F. Supp. 1 (E.D. La., 1965) interpreted "sidetrack" in the context of the Interstate Commerce Act, 49 U.S.C.A. para. 1 et seq. That statute, construed to be remedial in nature, was given a wide interpretation. Similarly, words that confer coverage in an insurance contract are to be given a wide interpretation. This decision is therefore a valuable tool to ascertain the meaning of "sidetrack" agreement.

"Elevator", as in an "elevator maintenance agreement" is defined in the definition section of the policy shell. It applies to mechanisms designed to carry passengers and material and is not applicable to hoists and dumbwaiters. An example of what is meant by liability assumed under an "elevator maintenance agreement" is Bituminous Casualty Corp. v. R & O Elevator Co.[445] In that case, the insured contracted with the owner of a building to inspect the elevators once a month, make necessary adjustments, apply lubricants as needed, and advise the owners of any repairs or replacements required. A number of people were injured when an elevator fell to the ground floor. A claim was advanced against the insured for its failure to properly inspect and lubricate the elevator and its alleged failure to notify the owners of the need for repair and replacement of parts. The court concluded that the insured's potential liability existed by reason of an "elevator maintenance agreement" and was within coverage.[446]

The definition of "incidental contract" refers to "written agreements". Consequently, liability flowing from any of these contracts, which are entirely oral, would be excluded. The language of the definition does not specify that the agreement must be wholly in writing. If any of the incidental contracts are partly written and partly oral, they would remain within the exception for incidental contracts. This is because the definition does not require that the incidental contracts be wholly in writing and any ambiguities in the policy language would be construed against the insurer, in a manner favourable to the insured.[447]

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[445] 293 F. 2d 179 (C.A., 8th Cir., 1961), applying Minnesota law.

[446] Coverage was denied under the insured's Contractor's Liability Policy by reason of the completed operations exclusion. The court held that an elevator maintenance agreement, requiring monthly inspections, gave rise to what was alleged as an accompanying duty to notify the owners of the elevator of any need to repair. It was held that if that duty existed, it was continuous, and was not caught by the completed operations exclusion.

[447] For an illustration of this interpretive rule as applied to an exclusion for contractual liability utilizing non-standard wording, see: T.W. Thompson Ltd. v. Simcoe & Erie Insurance Co. (1976), 12 O.R. (2d) 184, 68 D.L.R. (3d) 240, [1976] I.L.R. 90 (para. 1-734) (Ont. C.A.); aff'g (1975), 8 O.R. (2d) 455, 58 D.L.R. (3d) 327, [1975] I.L.R. 1187 (para. 1-678) (Ont. H.C.).

7.3 THE EXCEPTION WITH RESPECT TO "A WARRANTY OF FITNESS OR QUALITY OF THE NAMED INSURED'S PRODUCTS"

Before this exception was added to the policy, Canadian courts took the position that the liability imposed upon a vendor, pursuant to the implied terms of Sale of Goods legislation, was "liability imposed by law", within the meaning of the insuring agreement, but that it was excluded from coverage by reason of the exclusion for liability assumed by the insured under any contract or agreement.[448]

By including the phrase "a warranty of fitness or quality of the Named Insured's products", as an exception to the contractual liability exclusion, the coverage of the 1978 I.B.C. CGL model policy is:

> "more comprehensive" of the business liabilities of its insured than would be the case if the exclusion had been left in the language employed in the policies in the earlier cases.[449]

It is more comprehensive because,

> This exception removed from the exclusion those contracts that are for the sale of goods where the claim is for a breach of warranty, even though liability has been assumed in that contract or agreement. We can only speculate as to why these changes were made. It could well be that the very limited coverage that the policy gave as a result of the Andrews & George case made it difficult for...[the insurer]...to sell this particular policy.[450]

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[448] The Canadian Indemnity Co. v. Andrews & George Co. Ltd., supra, n. 423.

[449] per Clement, J.A., Moffat Tank Co. Ltd. v. The Canadian Indemnity Co. Ltd., [1974] 1 W.W.R. 688, 42 D.L.R. (3d) 260, [1974] I.L.R. 870 (para. 1-680) (Alta. S.C. A.D.); aff'g [1973] 5 W.W.R. 170, [1973] I.L.R. 737 (para. 1-568) (Alta. S.C. T.D.), at p. 699 ([1974] 1 W.W.R.).

[450] Ibid. at p. 693 ([1974] 1 W.W.R.). See also Cansulex Limited v. Reed Stenhouse Limited at al. supra, n. 425.

This exception to exclusion (a) ensures that liability flowing from breach of the implied conditions of fitness and quality under sale of goods legislation is within coverage. However it is extremely important to note that this does not mean that the policy guarantees the fitness of the insured's product. The insured's liability for damage to its product, or the failure of its product to perform as warranted, is excluded by the "product itself" exclusion, exclusion (i). The purpose of the policy is to cover the liability of the insured for injury to others or damage to property of others caused by the insured's products or services. If the insured breaches its warranty of fitness, and as result of that breach, damages property belonging to others, the insured's liability for that damage is covered.

If the facts of Andrews & George Co. v. Canadian Indemnity Co.,[451] were litigated under the 1978 I.B.C. CGL policy, the insured would have been covered for its liability to the lumber company. The insured sold glue that it manufactured to a lumber company for the manufacture of plywood. It impliedly warranted that the glue was fit for that purpose. By some accident in manufacture, the insured's glue would not hold the pieces of lumber in place. The insured would be covered for its liability for the lumber wasted by the glue that would not hold. However, the policy would not cover the insured's liability to the third party for the glue that did not perform according to its warranty. Farris, C.J.S.C., who rendered the trial judgment in that case, feared that to afford coverage to a claim for breach of warranty "would be to find that the Insurance Company was guaranteeing the quality of the goods of the insured",[452] has not materialized because of the inclusion in the policy of exclusion (i).[453]

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[451] Supra, n. 423.

[452] Ibid. at p. 789 ([1951] 1 D.L.R.).

[453] This exclusion is discussed in Chapter 10. Moffat Tank Co. Ltd. v. The Canadian Indemnity Co. Ltd. supra, n. 449, is a case where the insurer did effectively guarantee the insured's product. Damages were awarded for the cost of tanks which the insured sold to the third party, and which proved to be defective. The insured's liability to pay damages was held to be within coverage. The particular wording of the policy

The "warranty of fitness" exception was also held to encompass the warranty of a shipper of goods that the goods are fit for safe carriage under the Carriage of Goods by Water Act.[454] Hence, although the exception is principally directed at the implied warranties under the Sale of Goods legislation, it would also apply to any warranty given by the insured with respect to the fitness of its product.

To conclude, the Insured's liability for a breach its warranty of fitness of quality which results in accidental bodily injury or property damage to others is not excluded. There is no coverage if the property damage complained of is to the insured's own product. However, the policy applies if by reason of a breach of the fitness warranties implied in a contract of sale by Sale of Goods legislation, the insured's product injures persons other than insured persons, or damages property belonging to others, other than the insured's product.

7.4 THE EXCEPTION WITH RESPECT TO A WARRANTY THAT WORK PERFORMED BY OR ON BEHALF OF THE NAMED INSURED WILL BE DONE IN A WORKMANLIKE MANNER

The same reasoning regarding the purpose of the policy and the role of the

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in question extended coverage for this liability. On the particular wording before them, the Alberta Supreme Court, Trial and Appellate Divisions, correctly held that the exception in the concluding paragraph of Exclusion 10 modifies exclusion 10(i) as well s 10(ii). This is simply an example of the poor draughtsmanship which, unfortunately, is endemic to some of the non-standard policies. It is unlikely that the insurer intended to underwrite this hazard. Had the insured in Moffat, supra, n. 449, been insured under the 1978 I.B.C. CGL model policy, it is unlikely that the claim would have been covered in view of exclusion (i).

[454] R.S.C., c. C-15, s. 4(6): Cansulex Limited v. Reed Stenhouse et al, supra n. 425, at p. 8063 (I.L.R.).

warranty of fitness applies to the exception regarding the warranty that "...work performed by or on behalf of the insured will be done in a workmanlike manner...".

Assume that the insured enters into a contract with a third party to build a home, office tower, or warehouse, and after completion, the basement floods, the roof leaks, or the structure wholly or partially collapses. Is the the third party's claim for damages for the cost of making good the defects, as well as incidental costs connected therewith, covered by the 1978 I.B.C. CGL model policy? In most cases, the insurer would deny coverage, stating that the CGL Policy is not a performance bond. This type of damage is recoverable under the insured's "builder's all-risk", also called "a course of construction" policy. However, the insured is likely to point to this exception to exclusion (a), and assert that the third party claim is covered. Who is right?

The leading American decision in this area is Haugan v. The Home Indemnity Co.,[455] a decision of the South Dakota Supreme Court, which considered an exclusion identical to exclusion (a) of the 1978 I.B.C. CGL model policy. The Court stated that the exception regarding breach of an implied warranty of fitness, quality or workmanship simply means that this liability is immune from the effect of exclusion (a). The liability remains subject to and limited by all the other exclusions of the policy. The "product itself exclusion"[456] or the "work performed exclusion"[457] would remove from coverage all damage to the insured's product or work. This indicates that the policy will cover the insured's liability for property damage arising from a breach of a warranty concerning fitness or workmanship if the property damaged is other than the insured's own product or work. In the example above, the building built by the insured is its product or work. Its claim would therefore be for a defect in its product or work and would be excluded by exclusions (i) or (j). The policy is not to be construed as a performance bond or a guarantee of the insured's liability to make good its own work. That is not a risk that can be economically underwritten in a standard form CGL policy. That is why there is "builder's all-risk" insurance. The CGL policy does apply where the insured's construction injures others or damages property owned by others, other than the work constructed by the insured. It may seem ridiculous that the CGL policy only applies if the defect in the insured's work causes injury or damage, and not if the construction fault is detected short of causing injury or damage. However, it must be remembered that the CGL policy is a policy of insurance designed to cover the insured's liability for injury or damage to others caused by its products or services. It is designed to work in conjunction with other forms of insurance to provide complete protection for the insured.

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[455] 197 N.W. 2d 18 (S.D., 1972).

[456] Exclusion (i) of the 1978 I.B.C. CGL model policy, considered in Chapter 10.

[457] Exclusion (j) of the 1978 I.B.C. CGL model policy, considered in Chapter 11.

Several American States have not accepted this reasoning and have adopted an argument which insists that exclusions (i), and (j), read in conjunction with exclusion (a), create an ambiguity. Exclusion (a), containing an express exception respecting a warranty that work performed by or on behalf of the Named Insured will be done in a workmanlike manner, must *grant* or *extend coverage* for liability to pay damages for work performed in a negligent and unworkmanlike manner. This grant of coverage is repugnant to exclusions (i) and (j), which take away what has been granted by the exception in exclusion (a). As reasonable persons would differ as to the meaning of exclusions (i) and (j), this ambiguity must be resolved in favour of the insured so as to provide coverage.

This argument is premised on a fundamental misconception concerning exclusions and exceptions to exclusions. As noted earlier in this work, exclusion clauses do not grant or even enlarge coverage. They limit or restrict the coverage provided by the insuring agreement. Hence, exceptions to exclusions simply limit the extent of those exclusions; they do not and cannot provide or enlarge coverage. Despite this, the argument has been accepted by the courts in Michigan,[458] North Dakota,[459] Arizona,[460] and New Hampshire.[461]

In an extremely well reasoned opinion, the Supreme Court of Alaska in U.S. Fire Insurance Co. v. Colver,[462] rejected the notion that the exception in exclusion (a) gives rise to an ambiguity and forestalled an argument based on the doctrine of reasonable expectations:[463]

> While we recognize that Exclusion (a)...[identical to exclusion (a) of the 1978 I.B.C. CGL model policy]...may have been somewhat confusing to the insured, the subsequent exclusions gave him full notice that property damage to his work or work product, would not be covered by the policy...we do not believe that a lay person reading exclusion (a) together with the other exclusions could reasonably conclude that coverage was provided for any and all damages claimed to have been caused by the insured's breach of warranties.[464]

States that have specifically rejected the argument that there is an ambiguity here, are: South Dakota,[465] California,[466] West Virginia,[467] Florida,[468]

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[458] Fesard v. Michigan Millers Mutual Insurance, 296 N.W. 2d 112 (Mich. App., 1980).

[459] Applegren v. Milbank Mutual Insurance Co., 268 N.W. 2d 114 (N.D., 1978); Aid Insurance Services Ltd. v. Geiger, 294 N.W. 2d 411 (N.D., 1980).

[460] Federal Insurance Co. v. P.A.T. Homes Inc., 547 P. 2d 1050 (Ariz., 1976); Custom Roofing Co. Inc. v. Transamerica Insurance Co., 584 P. 2d 1187 (Ariz. App., 1978).

[461] Commercial Union Assurance Co. v. Gollan, 394 A. 2d 839 (N.H., 1979); Commercial Union Assurance Co. v. Gilford Marina Inc., 408 A. 2d 405 (N.H., 1979).

[462] 600 P. 2d 1 (Alaska, 1979).

[463] See Chapter 2, pp. 25-30.

[464] Supra, n. 462 at p. 4.

[465] Haugan v. Home Indemnity Co., supra, n. 455.

[466] St. Paul Fire & Marine Ins. Co. v. Coss, 145 Cal. Rptr. 836 (App., 1978); St. Paul Fire & Marine Ins. Co. v. Sears Roebuck & Co., 603 F. 2d 780 (Calif. App., 1979).

[467] Helfeldt v. Robinson, 290 S.E. 2d 896 (W.Va., 1982).

[468] La Marche v. The Shelby Insurance Co., 390 So. 2d 325 (Fla., 1980)

[469] Vernon Williams Construction Inc. v. The Continental Ins. Co., 591 S.W. 2d 760 (Tenn., 1979).

Tennessee,[469] New York,[470] Alaska,[471] Indiana,[472] Minnesota,[473] New Jersey,[474] Texas,[475] and Alabama[476].

When faced with this issue, Canadian courts should follow the weight of American authority and hold that the exception to exclusion (a) respecting a warranty of workmanship, is immune from exclusion (a), but subject to the provisions of any other applicable exclusion. Support for this analysis is found in Moffat Tank Co. Ltd. v. The Canadian Indemnity Co. Ltd.[477] At both the trial and appeal levels, the courts held that a warranty of fitness of quality, an exception to exclusion (a), is withdrawn from the operation of exclusion (a), and placed back into coverage. It follows that as it remains part of the grant of coverage, it is subject to any other applicable exclusion contained in the policy. This analysis is true to the insuring intent of the CGL policy.[478] A contractor:

> ...can take pains to control the quality of the goods and services he supplied. At the same time he undertakes the risk that he may fail in this endeavour, and therefore incur contractual liability whether express or implied. The consequence of not performing well is part of every business venture; the replacement or repair of faulty goods and works is a business expense, to be borne by the insured contractor in order to satisfy customers.[479]

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[469] Vernon Williams Construction Inc. v. The Continental Ins. Co., 591 S.W. 2d 760 (Tenn., 1979).

[470] Zandri Construction Co. v. Fireman's Ins. Co. of Newark, 440 N.Y.S. 2d 353 (App., 1981); J.G.A. Construction v. Charter Oak Fire Insurance Co., 414 N.Y.S. 2d 385.

[471] U.S. Fire Insurance Co. v. Colver, supra, n. 462.

[472] Indiana Ins. Co. v. Dezutti, 408 N.E. 2d 1275 (Ind., 1980), at p. 1279.

[473] Moorhead Machinery & Boiler Co. v. Employers Commercial Union, 285 N.W. 2d 465 (Minn., 1979).

[474] Weedo v. Stone-E-Brick Inc., 405 A. 2d 788 (N.J., 1979).

[475] Travelers Insurance Co. v. Volentine, 578 S.W. 2d 501 (Tex., 1979).

[476] Cotton States Mutual Ins. Co. v. Norell, 370 So. 2d 270 (Ala., 1979).

[477] Supra, n. 449.

[478] See also, Cansulex Limited v. Reed Stenhouse Limited et al, supra, n. 425, at p. 8064 (I.L.R.), where the court referred to the New Jersey case, Weedo v. Stone-E-Brick Inc., supra, n. 471, with approval.

[479] Weedo v. Stone-E-Brick Inc., supra, n. 474, at p. 791.

There is no doubt that most contractors insured by CGL policies would applaud an interpretation which holds that the exceptions to exclusion (a) read with exclusions (i) and (j) create an ambiguity. The Florida Supreme Court has highlighted that the practical result of this interpretation would be that contractors would receive an initial payment for their work from the project owner pursuant to contract, then receive subsequent payment from their CGL insurers to repair and correct the deficiencies in their work. The intent of the policy is not to provide coverage for building flaws and deficiencies but to cover damage *caused* by those flaws.[480] The Indiana Supreme Court noted that this argument effectively converts the CGL policy into a performance bond or a guarantee of contractual performance.[481] That is not the intent of the policy.

The CGL policy is not designed to insure a contractor's business risks. It is designed to insure another type of risk which a contractor faces:

> There exists another form of risk in the insured-contractor's line of work, that is, injury to people and damage to property caused by faulty workmanship. Unlike business risks of the sort described above, where the tradesman commonly absorbs the costs attendant upon the repair of his faulty work, the accidental injury to property or persons substantially caused by his unworkmanlike performance exposes the contractor to almost limitless liabilities. While it may be true that the same neglectful craftsmanship can be the cause of both a business expense of repair and a loss represented by damage to persons and property, the two consequences are vastly different in relation to sharing the cost of such risks as a matter of insurance underwriting.[482]

The intent of the CGL policy is to cover injury to people and damage to property, other than the insured's own work or product. The policy will indemnify the insured if a breach of a warranty of fitness or workmanship falls within the rubric of "accident", and causes others bodily injury or property damage, where the property damaged is other than insured's work or product. It may seem ludicrous that the policy does not apply to the insured's liability to repair or replace its product or structure, but does apply to injury or damage caused by the fault. It must not be forgotten that the CGL policy is one of several insurance policies that the average business must purchase to be fully proctected against its liabilities. For example, a construction company would purchase a CGL policy and a builder's all-risk policy. With these policies the company would be protected against its liability to repair or replace any structure it builds and be protected if the structure causes injury or damage to others during construction or upon completion. If the CGL policy covered the insured's liabilities to repair or replace its product or structure, the premiums would be totally unaffordable by the average insured.

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[480] This was the thrust of the Florida Supreme Court's comments in La Marche v. The Shelby Mutual Insurance Co., supra, n. 468.

[481] Indiana Insurance Co. v. Dezutti, supra, n. 472. See also J.G.A. Construction Corp. v. Charter Oak Fire Insurance Co., supra, n. 470 ; Vernon Williams & Son Construction Inc. v. The Continental Insurance Co, supra, n. 469.; Bor-Son Building Corp. v. Employers Commercial Union, 323 N.W. 2d 58 (Minn., 1982).

[482] Ibid.

7.5 CONCLUSION

The insuring intent of exclusion (a) is very different from the way in which Canadian courts have interpreted it. It is intended to simply withdraw from coverage the insured's liabilities under hold harmless agreements. However, it has been interpreted to apply to all liabilites which the insured assumes under its contract with another.

This does not mean that the presence of the contract results in an exclusion from coverage. If the insured is liable to a third party in tort, on the basis of a duty of care created by a contractual relationship, and the insured has not assumed liability for the damage that occurred in its contract with the third party, the exclusion does not apply. Additionally, the exclusion only applies where the injury or damage is suffered by a party to the contract. The British Columbia Court of Appeal suggested in *obiter*, while giving reasons for judgment in Dominion Bridge,[483] that the exclusion only applies to property (and presumably) injury that is the subject of the contract. This appears to be a sensible result.

Most insureds wish to have contractual liability protection. They obtain that protection by purchasing a contractual liability policy which provides them with "blanket" protection for all of their contractual liability. Alternatively, they can protect themselves against liabilities flowing from a particular contract by having a contractual liability endorsement added to their CGL Policy.

Liabilities flowing from three classes of contracts are exempt from the contractual liability exclusion. The first category include liabilities flowing from written incidental contracts defined in the policy shell. The second class of contractual liabilities exempted contains those flowing from Sale of Goods legislation and any other warranties of fitness that the insured might give with respect to its goods. The third class comprises contractual liabilities flowing from the insured's guarantee of good workmanship.

It is important to note that these classes of contractual liabilities are exempt from the operation of the contractual liability exclusion but remain subject to any other applicable exclusion. For example, if the insured incurs contractual liability to make good a defect in its product caused by its defective workmanship, it will not be covered by the

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[483] Supra, n. 422.

1978 I.B.C. CGL model policy due to exclusion (i), the "product itself" exclusion. This type of liability would be covered under other insurance policies, in this case, a builder's all-risk policy.

In summary, this analysis of the contractual liability exclusion demonstrates how the insuring intent of the policy guides its interpretation. Without recognition of the purpose of the policy, one might be persuaded to construe this exclusion in such a way so that the policy is transformed into a performance bond. This would subvert its purpose and open the insurers to claims which were not contemplated when premiums were set. This practice would only result in elevated premiums for all potential insureds.

Chapter 8

Exclusion (b): The Automobile Liability Exclusion

Exclusion (b), the automobile liability exclusion, states:

> This insurance does not apply to:
>
> (b)**bodily injury** or **property damage** arising out of the ownership, maintenance, use, operation, loading or unloading by or on behalf of the **Insured** of any **automobile**;

"Bodily injury", "property damage" and "Insured" are defined in the definition section of the policy shell, and were discussed in Chapters 5 and 3. "Automobile" is defined as follows:

> "automobile" means any self-propelled land motor vehicle, trailers or semi-trailers while attached thereto or unattached (including its equipment mounted on or attached thereto) other than any of the following or their trailers, accessories and equipment:

> (i) vehicles of the crawler type (other than motorized snow vehicles),
>
> (ii) trailers (other than road transport trailers designed to haul trailers or semi-trailers), road rollers, graders, scrapers, bulldozers, paving machines and concrete mixers of the mix-in-transit type);
>
> (iii) other construction machinery and equipment mounted on wheels but not self-propelled while not attached to any self-propelled land motor vehicle;
>
> (iv) self-propelled land motor motor vehicles used solely on the premises of the **Insured**.

The automobile liability exclusion, read with the definition of "automobile", withdraws from coverage those hazards covered under the standard auto policy,[484] government owned vehicle insurance plans,[485] fleet policies, and motor carrier liability policies. This Chapter discusses the automobile liability exclusion by examining the terms and phrases used in the exclusion which have given rise to coverage debates: the definition of automobile; "arising out of"; "ownership, maintenance, use or operation."

8.1 "AUTOMOBILE"

The definition of "automobile" read with the automobile liability exclusion excludes the insured's liability for bodily injury and property damage, arising out of the ownership, maintenance, use or operation of "self-propelled land motor vehicles." "Self-propelled land motor vehicles" is not defined in the policy. However, reading this phrase in the context of the definition, and the four exceptions to the definition, it is clear that it refers to those vehicles that are self-propelled, subject to motor vehicle registration, maintained for use on public roads, and designed for hauling passengers or cargo. Public liability insurance for vehicles of this type is available through other policy forms. The CGL policy is intended to cover the insured's liability for bodily injury or property damage arising from vehicles which are maintained for exclusive use on the insured's premises.[486]

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[484] As of September 1, 1987, the provinces in which the standard auto policy applies are: Alberta, Ontario, New Brunswick, Prince Edward Island, Nova Scotia and Newfoundland.

[485] As of September 1, 1987, the provinces with government owned vehicle insurance plans, are, British Columbia, Saskatchewan, Manitoba, and Quebec

The exceptions to the definition are listed as parts (i) to (iv). Part (i) contains an exception to the exception. "Motorized snow vehicles" are within the definition of "automobile" and hence liability arising from the ownership, maintenance, use or operation, loading or unloading of these vehicles is excluded. "Motorized snow vehicles" is not defined in the policy. It is designed to cover snowmobiles and vehicles similar to snowmobiles. These vehicles are normally insured under the auto policy. As a result they are to be considered "automobiles" under the CGL, and subject to the exclusion.

Parts (ii) and (iii) are included to ensure that a contractor's motorized equipment is not caught by the definition of "automobile". The insured's liability for bodily injury and property damage arising from the use of this equipment is not excluded by the automobile liability exclusion.

Part (iv) is an exception for self-propelled land motor vehicles used solely on the insured's premises. This is a "catch-all" section, designed to provide coverage for equipment that is incidental to the insured's operations but does not fit the enumerated categories. An example would be geophysical exploration and well servicing equipment. Another example would be liability arising out of the use and operation of "vehicles" such as forklifts, which are part and parcel of the insured's operations, and used entirely on its premises. However, this part of the "automobile" definition is broad enough to provide public liability coverage for the insured's liability arising out of a fleet of racing cars, go-carts, dune buggies, or motorcycles, that it owns and maintains for racing or "dare-devil" attractions on its premises. Although this type of activity could be insured under the standard form CGL policy it is doubtful that an insurer would do so. This type of thing would be insured under a manuscript liability policy--a liability policy which is written by an insurance broker for its client, the insured, and accepted by the insurer.

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[486] These conclusions are based, in part on a comparison of the 1978 I.B.C. CGL model wording with the American 1973 I.S.O. CGL model wording. The American policy defines "automobile" as to what is included in the definition. As both are aimed at excluding the same risk, they may be favourably compared.

There are a few Canadian decisions interpreting the "automobile" definition. The issue of whether claims arising from the transportation of the equipment mentioned in parts (i) through to (iv) is exempt from the definition of "automobile" was placed before Arbitrator Richard W. Bird of Fredriction, New Brunswick in 1980. His decision, reported under the style, Imperial Equipment Limited and Eastern Paving Limited v. Royal Insurance Company of Canada,[487] dealt with a CGL Policy which contained a definition of "automobile" identical to this one. In that case, the insured's workmen finished paving a street. The paving machine was loaded onto a trailer towed by a truck, so that it could be moved a few blocks away to another street. As the trip was a short one, only one chain, as opposed to the usual two, was used to secure the paving machine to the trailer. The tractor and trailer unit, with the paver on board, had to climb a steep hill to reach the next job site. When the unit was part way up the hill, it rolled off the trailer, down the hill, and collided with a house. The CGL insurer denied coverage. The insured reimbursed the homeowners for their property damage, and brought this action for a declaration as to whether it was insured for this liability.

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[487] (1980), 31 N.B.R. (2d) 44, 75 A.P.R. 44, [1980] I.L.R. 1010 (para. 1-266) (N.B. Arbitration Award, Fredericton).

Coverage was denied on the basis that the definition includes the truck and the trailer that was carrying the paver. The loss was excluded as it arose from the use of these two vehicles. The insured put forth a two-pronged defense.

Firstly, it argued that the trailer in question is not the trailer of the truck, but the trailer of the paver. As pavers or "paving machines" are excepted from the definition of "automobile", the trailer is also excepted. The evidence indicated that the trailer was purchased to haul the paving machine, and was registered under New Brunswick legislation for that purpose. The arbitrator rejected that argument holding on a proper reading of the definition the intention was to classify as an "automobile" any trailer being towed by a vehicle considered an "automobile". Secondly, the insured argued that the accident did not occur as a result of the ownership, use or operation of any automobile (the truck), but occurred as a result of the ownership, use or operation of the paver, or possibly the trailer. Both are excepted from the definition of "automobile". As they are not "automobiles", the exclusion does not apply. This argument was also dismissed as the CGL policy is intended to cover the insured while operating the paver as a paver. At the time the damage occurred, the paver was not being used for the purpose for which it was designed and accordingly, at that time, it must be considered an "automobile".[488] It was determined that the insurer rightfully denied coverage as the CGL policy does not cover bodily injury or property damage caused by the transportation of that equipment excluded from the definition of "automobile". This is a hazard that is covered under fleet policies.

A second decision that dealt with the definition of "automobile", is Bryson

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[488] This decision is an excellent example of how one reaches a conclusion concerning the interpretation of disputed clauses by looking at the purpose for which the CGL policy was issued.

v. Hartford Fire Insurance Co.[489] In that case, the third party, an employee of the insured, was injured by the negligent operation of a front-end loader owned by the insured, and operated by another employee. The third party sued the employee who operated the machine, and the insured. He obtained judgment against the employee but his action against the insured was barred by Workmen's Compensation legislation. In a rather imaginative attempt to circumvent the effect of that legislation, the third party tried to invoke a section of the British Columbia Insurance Act extending third party liability coverage to those who own automobiles involved in accidents when they are driven by others with their consent. He argued that the definition of "automobile" in the insured's CGL Policy (identical to the 1978 I.B.C. CGL policy) did not include a front-end loader. Therefore, the CGL Policy provided third party liability coverage with respect to the use and operation of that machine. The CGL Policy provided the same type of coverage as an owner's policy under the Insurance Act. The court quickly disposed of the argument by stating that even though the CGL policy covers self-propelled vehicles such as front-end loaders under certain conditions, the wording of the CGL policy: "cannot be tortured so as to make it an "owner's policy" within the meaning of the...[Insurance Act]."[490]

To conclude this part, "automobile" is defined to include self-propelled vehicles, subject to motor vehicle registration, maintained for use on public roads, and designed for hauling passengers or cargo. Excepted from this definition, and excepted from the exclusion, are those vehicles not subject to motor vehicle registration, and maintained for exclusive use on the insured's premises. Liability arising from the transportation of excepted vehicles on flat bed trailers, or other conveyances, is liability arising from the use or operation of an automobile, and is excluded.

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[489] [1978] I.L.R. 949 (para. 1-952) (B.C. S.C. T.D.).

[490] Ibid. at p. 950.

8.2 "ARISING OUT OF"

The exclusion indicates that coverage will not be extended to a claim for bodily injury or property damage, "arising out of" the ownership, maintenance, use or operation of an automobile as defined. Law, Union & Rock Insurance Co. Ltd. v. Moore's Taxi Limited,[491] a decision of the Supreme Court of Canada, is the leading case discussing the degree of causation required to fall within the phrase, "arising out of".

In that case, the insured taxi company held a contract to transport retarded children to and from school. They were to take them directly to their homes from school, and not let any child out on the side of the street opposite his or her home. One of the insured's drivers, acting in breach of that contract, and the duty that it owed to the child, stopped on the side of the street opposite the child's home, and let the child out of the taxi to cross the street alone. The child was hit by a truck and severely injured. The insurer denied coverage for the claim brought by the child and his parents against the insured on the basis of an exclusion similar to exclusion (b) which read:

> The Company shall not be liable under this Insurance for claims arising out of...the ownership, maintenance, use or operation by or on behalf of the Insured of any motor vehicle, trailer or semi-trailer which is obliged by law to carry a license or of any aircraft or watercraft.[492]

The insured was found liable for the child's injuries,[493] and instituted this action to ascertain its rights under the policy. The issue was whether the insured's liability was one "arising out of...the ownership, maintenance, use or operation...of a motor vehicle."

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[491] [1960] S.C.R. 80, 22 D.L.R. (2d) 264; aff'g (1960) 67 Man. R. 11, 20 D.L.R. 149 (Man. C.A.); rev'g the unreported decision of Williams, C.J.M. of the Manitoba Court of Queen's Bench.

[492] Ibid. at p. 81 (S.C.R.).

[493] Finbow et al v. Domino et al (1958), 65 Man. R. 240 (Man. Q.B.).

Ritchie, J., speaking for the court held that the insurer was obliged to extend coverage to the insured. He stated that the insured's liability arose out of a breach of duty which occurred after the vehicle was stopped, and the child was standing alone preparing to cross the street unescorted. This duty had nothing to do with the use or operation of the insured's vehicle. He concluded:

> ...the words "claims arising out of...the ownership, use, or operation...of any motor vehicle" as used in this exclusion can only be construed as referring to claims based upon circumstances in which it is possible to trace a continuous chain of causation unbroken by the interposition of a new act of negligence and stretching between the negligent use and operation of a motor vehicle on the one hand and injuries sustained by the claimant on the other. In the present case the motor vehicle was stationary at the accident and the chain of causation originating with its use was severed by the intervening negligence of the taxi driver whose failure to escort the boy across the street was the factor giving rise to the...[insured's]...liability.[494]

It follows that the insured's liability to a third party will be covered by the CGL policy if it can be traced to an accident that is isolated by an intervening event from the use or operation of an automobile. However, if the insurer can demonstrate that the negligent use or operation of an automobile initiated an unbroken chain of events resulting in the bodily injury or property damage complained of, then it may well deny coverage on the basis of exclusion (b). This would place the insured's auto liability insurers at risk.

This decision has been followed on numerous occasions by courts across Canada.[495] There are several decisions where the chain of causation between the insured's ownership, maintenance, use or operation of the vehicle, and the resultant loss and injury, was held to be broken by other acts of negligence of the insured, obliging the CGL insurer to defend.

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[494] Supra, n. 491, at pp. 84-85 (S.C.R.).

[495] Huba v. Schultze (1963), 37 D.L.R. (2d) 570 (Man. Q.B.); Hubarewich v. Nousek et al (1963), 43 D.L.R. (2d) 306 (Alta. C.A.); Knowton v. Public Trustee of Alberta (1966), 57 W.W.R. 370 (Alta. S.C.).; Legault v. Compangnie D'Assurance Generale de Commerce (1967), 65 D.L.R. (2d) 230 (Que.

An example is Mississauga Association for the Mentally Retarded et al v. Hartford Fire Insurance Co. et al.[496] The insured's bus driver stopped his bus, disembarked, and crossed the street to speak to a group of people to invite them to ride the bus. One of this group was struck by a vehicle while attempting to cross the street and get on the bus. As in Moore's Taxi,[497] the insured's liability to the injured person was held to be separate and apart from the use or operation of the bus, and the CGL insurer was bound to defend the claim.

In Yurkowski v. Federated Mutual Implement and Hardware Insurance Co. et al,[498] the insured was driving home from a hunting trip in his pick-up truck, when he stopped to adjust the position of some guns located on a gun rack at the rear of the vehicle. In doing so, one of the weapons discharged, killing his companion. The insured held two insurance policies. One was a personal liability policy (which contained an exclusion similar to exclusion (b)), and the other was a standard auto policy. The court had to determine which one applied. The insured's liability to the estate of his companion was held not to arise from the use or operation of the vehicle. When the gun discharged, it had

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C.A.); Yurkowski v. Federated Mutual Implement and Hardware Insurance Co. et al, [1975] I.L.R. 1293 (para. 1-706) (B.C. S.C.); Chateauvert v. Economical Mutual Insurance Co., [1980] I.L.R. 834 (para. 1-1223) (Ont. H.C.); Johnson v. Lee (1980), 17 B.C.L.R. 324 (B.C. S.C. T.D.); Tabata et al v. Argau et al (1980), 21 B.C.L.R. 43 (B.C. S.C. T.D.); Mississauga Association for the Mentally Retarded et al v. Hartford Fire Insurance Co. et al., [1981] I.L.R. 5322 (para. 1-1399) (Ont. H.C.); Kracson et al v. Pafco Insurance Co. (1981), 121 D.L.R. (3d) 498 (Ont. Cty. Ct.). Note that this list is intended as a guide and is not to be thought of as exhaustive. Also note that some of the cases include claims arising by reason of contract but the contractual liability exclusion is not discussed. As stated in Chapter 7 at p. 154, this most likely because the insured had a contractual liability endorsement.

[496] Supra, n. 495

[497] Supra, n. 491.

[498] Supra, n. 495.

been freed from the rack and was under the control of the insured. There was no real connection between the use or operation of the vehicle and the firing of the weapon. The personal liability insurers were liable to indemnify the insured.

Before leaving this aspect of the exclusion, it is interesting to note the observations of three justices of the High Court of Australia on the meaning of the phrase, "arising out of" as they occur in an auto policy insuring against "all liability incurred by the insured in respect of the death or bodily injury of any person caused by or arising out of the use of a motor vehicle."[499]

Barwick, C.J. stated:

> ...I think the expression "arising out of" must be taken to require a less proximate relationship of the injury to the relevant use of the vehicle than is required to satisfy the words "caused by"...[500]

Menzies, J., stated:

> The words "arising out of the use" have no doubt a wider connotation than the words "caused by...the use". To my mind, however, they do import a relationship between the use of the vehicle and the injury which has some causal element in it.[501]

Windeyer, J., stated:

> The words "injury caused by or arising out of the use of the vehicle" postulate a causal relationship between the use of the vehicle and the injury. "Caused by" connotes a "direct" or "proximate" relationship of cause and effect..."Arising out of" extends this to a result that is less immediate; but it still carries a sense of consequence. It excludes causes of

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[499] Government Insurance Office of New South Wales v. Green, [1967] A.L.R.106 (Aust. H.C.).

[500] Ibid. at pp. 108-109.

[501] Ibid. at p. 110.

> bodily injury in which the use of the vehicle is a mere causal concomitant, not considered to be, in a relevant causal sense, a contributing factor. But it is not necessary for the solution of this case to go into the wordy jungle that surrounds the lawyer's concept of causation.[502]

Although this decision of the High Court of Australia is only persuasive authority in Canada, it is in line with Mr. Justice Ritchie's statements in Moore's Taxi.[503] That case stated that where a causal relationship exists between the injury or damage and the ownership, maintenance, use or operation of an automobile as defined, the automobile liability exclusion is applicable. The operation or driving function of the vehicle, a condition of the vehicle itself, or an event arising by reason of the maintenance of the vehicle, must be linked to the injury or damage.

8.3 "OWNERSHIP, MAINTENANCE, USE OR OPERATION"

All of the common law provinces have legislation which imposes liability upon the "owner" of a motor vehicle for the damage caused by another while operating that vehicle, with the owner's consent, or when it is driven by a member of his household. Hence, by statute, a person can incur liability for damage or injury caused by a vehicle owned by him even when he is not driving. This legislation does not define "owner" and hence from the turn of the century, the courts have debated what degree of ownership will result in an imposition of the liability contemplated by this legislation. This body of case law is useful to determine the meaning of "ownership" in exclusion (b).

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[502] Ibid.

[503] Supra, n. 491. See also, Holm v. Mutual Service Cas. Ins., 261 N.W. 2d 598 (Minn., 1977); Dairyland Insurance Co. v. Esterling, 290 N.W. 2d 209 (Neb., 1980); United Service Auto Ass'n v. Aetna Cas. & Sur. Co., 429 N.Y.S. 2d 508 (N.Y. A.D., 1980).

For many years, the leading case in this area was the 1913 Ontario Court of Appeal decision, Wynne v. Dalby.[504] This case has been interpreted as authority for the proposition that the"owner" of a motor vehicle is the person who has dominion and control of the vehicle-- regardless of who was the registered owner.[505]

In 1972, the Supreme Court of Canada altered this line of authority by its decision in Hayduk et al v. Pidoboronzny.[506] In that case, the registered owner had purchased the car under a conditional sales agreement in his own name, but the vehicle had been used exclusively by the driver, and most of the payments had been made by the driver. The lower courts held that there had been a valid sale to the registered owner, and that under the applicable legislation, the registered owner was to be treated as the true owner until the contrary is proven. Ritchie, J., of the Supreme Court of Canada held that the registered owner is to be treated as the true owner until the contrary is proven. Laskin, J., (as he then was), held that the registered owner could escape the vicarious liability imposed upon him by proving that beneficial ownership lay in another. A subsequent Supreme Court of Canada decision, Honan v. Gerhold,[507] indicates that the registered or bare legal owner can only escape liability where it is proven that *exclusive* beneficial or equitable title lies with another.

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[504] (1913), 30 O.L.R. 67, 16 D.L.R. 710 (Ont. C.A.).

[505] Comer v. Kowaluk et al, [1938] O.R. 655, [1938] 4 D.L.R. 181 (Ont. C.A.); Haberl v Richardson, [1951] O.R. 302, [1951] 3 D.L.R. 34 (Ont. C.A.).

[506] [1972] S.C.R. 879, 29 D.L.R. (3d) 8, [1972] 4 W.W.R. 522; rev'g [1971] 3 W.W.R. 61, 19 D.L.R. (3d) 160, rev'g the unreported decision of Greschuk, J.

[507] [1975] 2 S.C.R. 866, 3 N.R. 81, 50 D.L.R. (3d) 582; rev'g [1973] 2 O.R. 341, 33 D.L.R. (3d) 657; aff'g [1972] 1 O.R. 713, 24 D.L.R. (3d) 130.

When determining who has beneficial ownership of the vehicle, the courts look to who, at the date of loss, had "dominion and control" of it. As this is a flexible test of ownership, designed to meet cases as they arise, all facts which are indicative of an assertion of ownership over a vehicle are relevant. The courts will look to matters such as who applied for insurance on the vehicle;[508] who applied for registration;[509] who disposed of the wreck, who claimed the salvage value;[510] whose licence plates the vehicle bore;[511] whether the vehicle is in a person's name for the simple purpose of obtaining lower insurance premiums;[512] who held the commercial license permitting the vehicle in question to be used on the highways;[513] who held the keys, and for what purpose.[514]

"Maintenance" does not appear to have been considered by the Canadian courts. An American authority, State Farm Mutual Automobile Insurance Co. v. Pan American Insurance Company[515] held that "maintenance" and "use" are distinct concepts. The former envisages steps taken to prevent a decline in condition. Filling a vehicle with fuel, repairing the carburettor, inflating a tire, changing the oil in the engine crankcase, are all acts of "maintenance". If these steps are not taken, the vehicle cannot run. Similarly, in Chase v. Dunbar,[516] the court stated that it is extremely difficult to distinguish between "maintenance" and "use". The motives of the operator must be looked at before deciding whether the vehicle is being used as a conveyance, or source of power ("use"), or used to determine if there is a problem with the mechanics ("maintenance"). A more recent case,

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[508] Ibid.
[509] Ibid.
[510] Ibid.
[511] Smith v. Stafford & Northside Toyota (1981), 29 A.R. 473 (Alta. Q.B.).
[512] Bois v. MacDonald, [1975] 5 W.W.R. 739 (Alta. C.A.).
[513] Edler v. Boyes Transport Ltd. (1974), 52 D.L.R. (3d) 21 (Ont. H.C.)
[514] Lelarge et al v. Blackney et al (1978), 92 D.L.R. (3d) 440 (N.B. C.A.).
[515] 437 S.W. 2d 542 (Tex., 1969), at 545.
[516] 185 So. 2d 563 (La. App., 1900).

Truck Insurance Exchange v. Aetna Casualty and Surety Co.,[517] held that starting a vehicle to test the engine and moving it to another location in the course of a tune-up was "maintenance" as opposed to "use".

These authorities indicate that "maintenance" is a flexible term aimed at those activities that keep the vehicle operational. The State Farm[518] case even extended "maintenance" to include re-fueling. It is likely that the majority of Canadian courts would hold that re-fueling is an activity incidental to the use of a vehicle.[519]

Canadian courts have considered the meaning of "use or operation" of a motor vehicle on several occasions. The leading case is the Supreme Court of Canada's decision in Stevenson v. Reliance Petroleum Ltd.[520] In that case, the insured, a company engaged in the distribution of oil and gas, held a motor vehicle insurance policy on its tank trucks providing coverage against "liability imposed by law upon the Insured for loss or damage arising from the ownership, use or operation of the automobile."[521] The insured was also covered by a CGL Policy, containing an exclusion for all claims "arising or existing by reason of...any motor vehicle...that is required by law to have a license and which is off premises owned, rented or controlled by the Named Insured."[522]

The insured's tank trucks were designed to transport gasoline to filling stations, and to off-load the gasoline from the truck's holding tanks to the underground tanks at the filling stations. An employee of the insured would drive the truck to the filling station. On arrival he would measure how much gasoline was currently in the underground tanks. He would then connect a hose to faucets located on the tank truck. The faucets were operated by a spring mechanism which was designed to be held open by hand. When the faucets were opened, gasoline would flow by force of gravity into the filling station's underground tanks. The tanks were filled to the level requested by the operator of the filling station.

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[517] 538 P. 2d 529 (Wash. App., 1975).

[518] Supra, n. 515.

[519] Support for this position is Gramak Ltd. et al v. State Farm Mutual Automobile Ins. Co., infra, n. 530; Stevenson v. Reliance Petroleum Ltd., infra, n. 521.

[520] [1956] S.C.R. 936, 5 D.L.R. (2d) 673, [1956] I.L.R. 127 (S.C.C.); aff'g [1954] O.R. 846, [1954] O.W.N. 743, [1954] 4 D.L.R. 730 (Ont. C.A.); aff'g in part and rev'g in part, [1953] 4 D.L.R. 755 (Ont. H.C.).

[521] Ibid, at p. 674 (5 D.L.R. (2d)).

[522] Ibid, at p. 675.

In this case, the driver did not measure the contents of the underground tanks. Rather than standing by the truck to hold the faucet open, he jammed the spring mechanism with a stick, and went off in search of payment for the gasoline he was delivering. On his return, he observed that the underground tanks had overflowed and before he could relieve the hazardous situation the gasoline ignited, destroying the filling station. At issue was whether the insured's liability for the damage was covered under the motor vehicle liability policy or the CGL policy. This turned on whether the damage arose out of the "use or operation" of the vehicle within the meaning of the CGL automobile liability exclusion.

Four of the five members of the Supreme Court of Canada that heard the case stated that the motor vehicle liability policy applied. Rand, J., whose reasons for judgment are representative of the majority position, addressed the issue of whether the negligence of the insured's employee arose out of the use or operation of the truck. He asked himself what the truck was used for and determined that it was used to carry gasoline products for delivery to filling stations: "[D]elivery was as much a part of what was being done by means of the truck as the carriage."[523] He concluded that the motor vehicle liability policy applied as the accident arose out of the "use" of the truck. He continued:

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[523] Ibid. at p. 676.

> Did the fire, then, result from negligence in delivering the gasoline? I cannot see how that can be seriously doubted...the truck is not "self-operating"; "use" implies human direction and utilization of its means; it is the combination of the two that constitutes the act to which innocence or negligence is to be imputed. That is the act intended to be embraced by the language of the clause. Here the overflow was physically the direct result of the pressure from the oil in the tank truck which was then under the control of the driver. His failure to ascertain the capacity of the underground tank and to remain at the truck faucet or closing valve constituted negligence in relation to the use of the truck in discharging the gasoline. That was part of the function of the tank truck and does not come within the class of differentiated uses mentioned...The expression "use or operation" would, or should, convey to one reading it all accidents resulting from the ordinary and well known activities to which automobiles are put, all accidents which in the common judgment in ordinary language would attribute to the utilization of an automobile as a means of different forms of accommodation of service.[524]

Mr. Justice Rand's analysis became known as the "purpose test". For a claim to arise out of the use or operation of an automobile, the injury or damage must be a consequence of the use of the automobile in a way that is not foreign to its nature.

This test was applied by the Supreme Court of Canada in Irving Oil Co. Ltd. v. Canadian General Insurance.[525] There, the operator of a tank truck, while delivering fuel oil to a theatre, negligently allowed oil to slop over the pipe leading to the basement, and run down a chute through which the pipe passed. The oil was the direct cause of a fire which destroyed the theatre an hour and a half after the spill. The issue before the Court was whether the "loading or unloading" of such a vehicle was encompassed within its "operation and use". The Supreme Court of Canada held the case to be indistinguishable from Stevenson.[526] Mr. Justice Rand stated that loading and unloading are integral functions of this vehicle and held that the damage arose out of its the "operation and use". The Supreme Court of Canada firmly entrenched the "purpose test" and accordingly, the loading and unloading of a vehicle is a hazard that is not covered by the CGL Policy.

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[524] Ibid. at p. 676.

[525] [1958] S.C.R. 590, 14 D.L.R. (2d) 337; aff'g N.B. S.C. A.D.; rev'g the New Brunswick Supreme Court, Trial Division.

The "purpose test", formulated in Stevenson,[527] and affirmed by Irving,[528] has been followed on several occasions by Canadian courts.[529]

An extreme example of its application is Gramak Ltd. et al v. State Farm Mutual Automobile Insurance Co..[530] The court held that a fire that occurred when the insured negligently drilled a hole in the trunk of his automobile to connect wiring for a trailer, arose from the ordinary and well-known activities to which the automobile might be put. Accordingly, the insured's liability arose out of the use or operation of an automobile, obliging the automobile insurer to defend.[531]

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[526] Supra, n. 520.

[527] Ibid.

[528] Supra, n. 525.

[529] McKenzie v. Western Assurance, Company., [1954] O.W.N. 907 (H.C.) (cons'd); The Winnipeg Supply & Fuel Co. Ltd. v. Canadian General Insurance et al, [1960] I.L.R. 769 (para.1-358 Man. Q.B.); Huba v. Schulze, supra, n. 495; B.A. Oil Co. v. Royal Exchange Assur., [1968] I.L.R. 257 (para. 1-203) (Ont. H.C.); Gramak v. State Farm Mutual Insurance (1976), 63 D.L.R. (3d) 630 (Ont. H.C.); Imperial Equipment Lease et al v. Royal Insurance Co. of Canada, supra, n. 487; Chateauvert v. Economical Mutual Insurance Co., supra, n. 495; Kracson v. Pafco Insurance Co. Ltd., supra, n. 496; Iaquone v. Floro, [1981] I.L.R. 5206 (para. 1-1367) (Ont. H.C.). It was also considered in Government Insurance Office of New South Wales v. Green, supra, n. 499. Note that this list is intended for use as a guide only. It is not a complete listing of those cases following Stevenson, supra, n. 520.

[530] Supra, n. 425.

[531] This case should be compared with Alabama Farm Bureau Mutual Cas. Ins. Co. v. Tubbs et al, 304 So. 2d 589 (Ala., 1974). In that case the insured was transferring a trailer hitch from an old car to a new car, when the welding torch he was using started a fire which destroyed the third party's property. The court held that the loss fell within the insuring agreement "to pay all damages...because of...destruction of property...caused by accident arising out of the maintenance of the automobile". "Maintenance" was construed to mean keeping up, supporting, upholding, and the insured was simply continuing an existing condition that was needed to uphold the automobile's use in his service.

A case which deviates from the "purpose test" is Watts v. Centennial Insurance Co.[532] The insured, a passenger in an automobile, opened a door on the passenger side of a car into the path of the oncoming third party vehicle. At issue was whether the insured's act constituted "use" of the vehicle, falling within the ambit of an exclusion similar to the automobile liability exclusion in a comprehensive personal liability rider to a homeowner's policy. It was argued that as the insured was not in the driver's seat, and did not have control of the vehicle, his act did not arise from the use of the vehicle. The court cited various definitions of "use", and it was noted that all of them implied "control". Additionally, the other descriptive nouns used in the exclusion, "ownership", "maintenance", "operation", imply control. In view of the ambiguity in the exclusion, the court applied the *contra proferentum* rule, and resolved the ambiguity against the insurer, in favour of coverage. Accordingly, the exclusion was limited to liabilities incurred in the active operation or direction of the vehicle, and not those ordinarily incidental to being a passenger.

This decision clearly deviates from the line of authority stemming from Stevenson,[533] and as such must be regarded as an aberration. Additionally, as the majority of coverage disputes involving this exclusion are in reality disputes between CGL and automobile insurers, it is inappropriate to apply the *contra proferentum* rule.[534]

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[532] (1967), 65 D.L.R. (2d) 529, [1969] I.L.R. 315 (para. 1-220) (B.C. S.C. T.D.).

[533] Supra, n. 520.

[534] This point was accepted by Arbitrator Bird in Imperial Equipment Lease v. Royal Insurance Company of Canada, supra, n. 487 at 1013 (I.L.R.).

8.4 CONCLUSION

This is one of the more frequently litigated exclusions in the CGL policy. More often than not, insureds will have a standard auto, fleet or motor carrier liability policy in addition to a CGL policy. If an event which gives rise to third party liability involves the use of one of the insured's vehicles, one of these policies applies. Very often either the insured or one or all of the insurers seek directions from a court to determine which policy applies. The reason that such cases come before the courts on such a regular basis is because of the Supreme Court of Canada's decisions in Law Union & Rock Insurance,[535] and Reliance Petroleum.[536] To determine if the transaction in question arose out of the use of an automobile as defined, two causation tests are used. One must look at the purpose of the vehicle, determine if the transaction arose out of the well known uses to which this type of vehicle is put, then ask if there is a continuous chain of causation flowing from this to the injury or damage. There is very little difference between these tests. In practical terms the same test is applied twice.[537]

The vagueness of these tests has resulted in a great deal of uncertainty in the area. It is extremely difficult to determine if the event is covered by the CGL policy or any of a number of motor vehicle policies held by the insured. For example, in Kracson et al v. Pasco Insurance Co. Ltd.,[538] a motorcyclist removed the cylinder head of a motorcycle insured under an auto policy, and took it to the basement of a residence where he cleaned it with a gas soaked rag. A fire was started by the rag and a spark. The damage was held to arise out of the ownership, use or operation of the motor vehicle, obliging the auto insurers to defend. In Storrie v. Newman et al. #2,[539] the insured assaulted his female passenger while driving the insured vehicle. He stopped the car and assaulted her again. He pushed her back in the car, and drove away. The passenger jumped out of the car as she was certain the car would be involved in an accident. She was injured, but her injuries were held not to arise out of the ownership, use or operation of a motor vehicle.

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[535] Supra, n. 491

[536] Supra, n. 520.

[537] See Hunter, A.D., Q.C., and Laycraft, J.B., *"Ownership, Use or Operation"*, unpublished paper, presented at the Mid-Winter Meeting of the Canadian Bar Association, Edmonton, Alberta, January, 1985.

[538] Supra, n. 495.

These decisions and others like them leave insurers with very little guidance as to the extent of the risk withdrawn from coverage by the automobile liability exclusion. If courts looked to the insuring intent of the policies before them when rendering their decisions, much of this uncertainty could be erased. Third party liability arising from the use of vehicles that are designed for public or private transportation, loading and unloading of persons or cargo is covered under the various forms of auto insurance. It is not intended that the CGL policy cover this risk.

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[539] (1982), 139 D.L.R. (3d) 482.

Chapter 9

Exclusion (h): The Fire and Property Damage Liability Exclusion

Exclusion (h), the fire and property damage liability exclusion, provides:

> This insurance does not apply to:
>
> . . .
>
> (h) **property damage** to
>
> > (1) property owned or occupied by or rented to the **Insured**, or
> >
> > (2) property used by the **Insured** , or
> >
> > (3) property in the care, custody or control of the **Insured** or property as to which the **Insured** is for any purpose exercising physical control, or
> >
> > (4) any personal property or any fixtures as the result of any work performed thereon by the **Insured** or anyone on his behalf;
> >
> > but parts (2) and (3) of this exclusion do not apply

> with respect to **property damage** (other than to **elevators**) arising out of the use of an **elevator** at premises owned by, rented to or controlled by the **Named Insured**;

"Property damage", "Insured", "elevator", and "Named Insured", are defined in the definition section of the policy shell, and were discussed in previous Chapters.

Exclusion (h), divided into four parts, relates to the insured's liability for property that it controls. Parts (1) to (3) withdraw from coverage liability that can be covered under other types of insurance. Part (4) withdraws uninsurable business risks from coverage. Consequently, this exclusion is similar to exclusion (b), the "automobile liability" exclusion, as both are placed in the policy to prevent duplication of available coverages.

Without exclusion (h), it is conceivable an insured could obtain coverage to repair or replace property that it owns, rents or controls, thereby obtaining direct loss property coverage, at a premium assessed on the basis of liability exposure. However, the third and fourth parts of exclusion (h) deprive insureds engaged in a service industry of the very coverage they need. To compensate for this, the industry offers at least three options.

Firstly there are several types of specialized liability policies .that are designed for dry cleaners, laundries, garages, and storekeepers. Insureds holding property on consignment or for storage can purchase a bailee's liability policy.

Secondly, insureds can also purchase umbrella liability insurance. This type of insurance was first underwritten in North America by Lloyd's of London. Canadian and American insurers have since developed their own versions. Umbrella liability insurance is non-standard; hence the coverages provided are as varied as the insurers that underwrite them. It provides excess coverage and also covers many risks excluded by underlying policies such as the CGL policy. For example, most umbrella liability policies do not contain a care, custody or control exclusion. The disadvantage of umbrella coverage is that it is usually subject to a large deductible. The insured is protected against a catastrophic loss, but not the usual liability that may occur in day-to-day operations.

Thirdly, contractors (and others) may purchase broad form property damage coverage. This is a form of coverage that may be added to a CGL Policy by endorsement.

Before examining the precise risks withdrawn from coverage by exclusion (h), it must be determined whether the four parts of exclusion (h) operate as separate exclusions or if they are to be read together. Spence, J., as he then was, who rendered the trial judgment in Stevenson v. Reliance Petroleum,[540] considered a similar exclusion. He read each of the exclusions cumulatively. The case was appealed to the Supreme Court of Canada. Locke, J., dissenting on the main issue, was the only member of that Court to comment on Spence, J.'s interpretation. He held that each part of the exclusion is to be read separately and independently of all other parts. If the terms of one part apply, it should not be affected by inferences that may be drawn from another part. He must be taken to have overruled Spence, J.'s interpretation, as he was the only appeal judge to comment on it. The conclusions of Locke, J. were ignored by the British Columbia Supreme Court, Trial Division, in Cansulex Limited v. Reed Stenhouse et al.[541] This decision commented on the interpretation of "use" as it appears in part two of the exclusion. It held that the word did not bear the meaning suggested by counsel as it is modified by the other parts of the exclusion, namely "owned", "occupied", "rented", and "care custody and control". Until the Supreme Court of Canada settles the matter, the better opinion appears to be that each of the four parts of exclusion (h) are to be read *seriatum*; separately, and independently from each other.[542]

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[540] [1956] S.C.R. 936, 5 D.L.R. (2d) 673, [1956] I.L.R. 127 (para. 1-238) (S.C.C.); aff'g (sub. nom. Reliance Petroleum v. Canadian General Insurance Co. and Lloyds), [1954] O.R. 846, [1954] O.W.N. 743, [1954] 4 D.L.R. 730, [1954] I.L.R. 653 (para. 1-150) (Ont. C.A.); aff'g [1953] O.R. 807, [1954] 1 D.L.R. 755, [1953] I.L.R. 306 (para. 1-123) (Ont. H.C.).

[541] (1986), 70 B.C.L.R. 273, 18 C.C.L.I. 24, [1986] I.L.R. 8051 (para. 1-2090) (B.C. S.C. T.D.).

This chapter will proceed to describe the hazards withdrawn from coverage by this exclusion, by addressing each part separately.

9.1 "PROPERTY OWNED OR OCCUPIED BY OR RENTED TO THE INSURED"

This part of the exclusion excludes the insured's liability for damage to property that it "owns", "occupies", or "rents". This part ensures that the purpose of the the policy is respected. The CGL Policy does not provide coverage for the insured's obligation or need to repair or replace real or personal property that it owns or controls. It protects the insured against its liability to others caused by its premises, products or operations.

As "property" is not modified by an adjective it refers to both real and personal property. Further, personal property may be tangible or intangible, corporeal or incorporeal. The terms "owned", "occupied", and "rented" require close analysis.

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[542] "Or" used throughout exclusion (h) is to be read disjunctively: Givers v. Baloise M. Ins. Co., [1959] O.R. 53 (C.A.).

(a) "Owned"

The first part of exclusion (h) specifies that damage to property "owned" by the insured is excluded. What constitutes "owned" property?

"Owned" is it is to be read as part of the lay vocabulary, and is not to be given a legalistic interpretation.[543] Webster's Third New International Dictionary defines "own" as "to have or hold as property or appurtenance; have a rightful title to, whether legal or natural; possess." The Shorter Oxford English Dictionary notes that the primary sense of "own" is "possessed". Canadian courts, interpreting "owned" as it appears in insurance policies, have stated that property is owned by those who have rightful title, and the right of control.[544]

A typical coverage issue dealing with the damage to property "owned" by the insured is as follows:

> ...assume the owner of a shopping center, through negligence of his maintenance staff, causes a boiler explosion resulting in cracked walls and loss of heat to stores leased to others. The owner's CGL policy clearly would not cover the cost of repairing the owned premises, even that portion leased to others. But what about damages for loss of use by the tenants? Note the definition of property damage, which is: (1) physical injury to or destruction of tangible property including the loss of use

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[543] See Chapter 2, p. 22, and the authorities listed at n. 49.

[544] British Columbia Bridge Dredging Co. Ltd. v. Royal Exchange Assurance, [1960] I.L.R. 744 (para. 1-353) (B.C. S.C. T.D.).

> thereof (i.e., the store premises which is (sic) physically injured); or (2) loss of...[use of]...the tangible property which has not been physically injured or destroyed, which is not applicable, since the store premises was (sic) physically injured. Hence, no coverage for the owner's liability to his tenants. But suppose there was no physical injury to the property and the loss of use was solely the result of loss of heat. This would fit the definition of "property damage" but there still would be no coverage since the property damage (loss of use) was to property owned by the insured.[545]

b) "Occupied"

Part (1) of exclusion (h) specifies that property which is "occupied" by the insured is excluded.

The issue of what constitutes "occupancy" of commercial premises was considered in Interprovincial Pipeline Co. v. Seller's Oil Field Service Ltd; Lloyd's of London et al., Third Parties.[546] In that case, the insured, whose business it was to clean oil storage tanks, contracted with a third party to clean out one of its tanks. While the insured's employees were performing this contract, the tank caught fire and was destroyed. The insured's CGL insurers denied coverage, stating amongst other things that the damaged property was "occupied" by the insured. The insured settled with the third party, and brought an action to contest the coverage denial.

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[545] Tinker, George H., *Comprehensive General Liability Insurance--Perspective and Overview*, (1975) 25:3 Federation of Insurance Counsel Quarterly, 217-309, at pp. 275-276.

[546] [1976] 3 W.W.R. 31, 66 D.L.R. (3d) 360, [1976] I.L.R. 172 (para. 1-759) (Man. C.A.); aff'g, [1975] 5 W.W.R. 521, 58 D.L.R. (3d) 719, [1976] I.L.R. 61 (par. 1-729) (Man. Q.B.). This is an example of a fact situation where one would think that the contractual liability exclusion would apply. However, the insured had a contractual liability rider to his policy, nullifying the effect of the exclusion. One would also think that the "work performed" exclusion would apply. This exclusion is not mentioned in the case report. Either the policy in question contained non-standard wording, or did not contain this exclusion, or its effect was modified by endorsement, or the parties agreed to limit the issues to the exclusion for which the case is cited. This would be the case for most of the cases cited in the Chapter as they would appear to involve claims that would be affected by one or more exclusions other than the one for which they are cited.

The trial judge, Wilson, J., whose opinion was affirmed by the Manitoba Court of Appeal, stated "occupation is a matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering."[547] The Court continued:

> Occupied about their task,...[the insured's]... workmen were obliged to and did pass freely from within its general location. Nevertheless, I would not consider the tank as "occupied" by... [the insured]...any more than one would say a room is occupied by the chambermaid who is there a short while tidying and making up the bed, or by the decorator engaged, it may be for several days, in restyling the room, except for the fact that, while actually present therein, they may take up (or "occupy") a certain amount of space. As in those examples,...[the insured's]...work crew was simply "on location" in and about the tank to do specific work; and while ...[the insured]...was free to perform that task in its own fashion, had the...[third party]...told it to stop,...[the insured] ...of course would have done so.
>
> Presence for that purpose, I think, is not the sense in which the word "occupied" is used in the exclusion under review, appearing as it does in a policy which specifically covers "tank farm cleaning" as an operation of the insured, an operation which, according to the witness Seller, could only be done as it was here. That being so, to construe "occupied" as the insurer argues would mean that...[the insurer]... had sold a policy under which no claim could arise, a conclusion I am loathe to reach.[548]

"Occupancy" of non-residential commercial premises has been considered by American courts. They have held that what amounts to vacancy and conversely occupancy is dependent upon the nature of the premises. For example, a factory would not be "occupied" if the business moves out, leaving the fixtures in place, and the sole human occupant is a security guard. A factory which is used merely for storage purposes is not

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[547] Ibid. at p. 731-732 (58 D.L.R. (3d)).

[548] Ibid.

"occupied". However, if the business of the factory was temporarily suspended to observe a statutory holiday, or because a strike is in progress, the building is still "occupied". Businesses that are seasonal in nature occupy their premises year around, even if the only thing in the premises during the off-season are tools.[549]

In C.O. Falter Inc. v. Crum & Forster Insurance Companies,[550] the insured sub-contractor contracted to do certain work on a project. On August 1, 1972, it finished the work and relinquished keys to the building. Certain minor repairs, such as cleaning floors and touching up paint, were completed in October and November. In December a natural gas explosion occurred which was caused by a break in a gas line. The gas line break had occurred prior to August 1st. The insured was sued for the damage to the building. Coverage was denied on the ground that the damaged premises were occupied by the insured at the time of the loss. In support of the denial, the insurers argued that the final certificate had not been received and that the owner of the building had not taken complete possession. The court concluded that the ordinary meaning of "occupied" is a continued physical presence. The insured's occasional trips to the building in October and November did not suggest that it occupied the premises within the intent of the exclusion even though the owner had not taken physical possession of the building. This is consistent with the insuring intent. A contrary result in such a situation would have excluded the insured's liability for damage that was not even remotely within its care and supervision.

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[549] 46 C.J.S. para. 556. It was held in the old Alberta case of Dodge v. Western Canada Fire (1912), 6 D.L.R. 366, that keeping a watchman about or even in commercial premises under construction, and intended for use and occupation, does not make them "occupied" premises. In Drovers Nat. Bank v. Great Southwest Fire, 371 N.E. 2d 855 (Ill., App., 1978), the court stated at p. 857:

> In an insurance contract, what is meant by the term "occupancy" is a question of law, but whether a building was occupied within the meaning of that term is a question of fact...Occupancy must be defined in relation to the purposes for which the property is designed and insured, and what constitutes such for one type of structure will not necessarily be the same one for a different type.

In Kolivena v. Hartford Fire Ins. Co., 290 N.E. 2d 356, 358 it was noted that mere storage use of the insured's manufacturing building does not constitute "occupancy" within the meaning of a vacancy clause.

[550] 361 N.Y.S. 968 (S.C., 1974).

To conclude this part, an on-location service company does not, generally speaking, occupy premises that it services. As to commercial premises in general, the insured is deemed to be in occupation where it continues to use the premises for their contemplated use over a period of time. If the insured incurs liability for damage to premises in which it has suspended operations, the policy would provide coverage, subject to any other applicable exclusion, the conditions, and the endorsements.

(c) "Rented"

Stevenson v. Reliance Petroleum[551] interpreted "rented" as it applies to real property. The insured, a distributor of petroleum products, was sued for fire damage to a service station caused by the negligence of its employee. The service station was owned by Gardiner and leased to the insured. The insured sublet the premises to Riddell. Both the head lease and the sub-lease were subsisting at the time of the accident. Gardiner sued the insured and Riddell for the damage to the service station. One of the grounds upon which the CGL insurers denied coverage was that the claim fell within an exclusion for liability for damage to "property owned or occupied by or leased to the Insured..."[552]

The trial judge, Spence, J., as he then was, read each part of the equivalent of exclusion (h) cumulatively. He noted that for the exclusion to apply, it was "essential...[that the]...property...is within the control, custody and care of the insured."[553] He concluded that it was never the intention of the parties to exclude the insured's liability for damage to property that it did not control at the time of the accident giving rise to liability. As the insured had sub-let the premises at the time of the accident, and did not physically control them, the exclusion did not apply.

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[551] Supra, n. 541.
[552] Ibid. at p. 769 ([1953] 4 D.L.R.).

Locke, J., of the Supreme Court of Canada was the only appeal judge to comment on this analysis. He stated that Gardiner's property was damaged by a fire started by the negligence of the insured's employee, for which the insured was liable. The property was leased to the insured. The fact that it was sub-let to Riddell did not affect the fact that the owner had leased it to the insured. The exclusion applied.

The exclusion considered in Stevenson[554] dealt with "leased" rather than "rented". In this context, there is no material difference between the two terms.[555]

Given the comments of Locke, J., it appears that if the insured is liable for damage to real property which it leases, the exclusion applies, even if the insured is not in possession at the time of the accident giving rise to liability. This is in line with the purpose of this exclusion, namely, to prevent duplication of other coverages available to the insured. This type of liability is covered under the fire legal liability policy. Further, this part of the exclusion applies to liability for damage to property that the insured owns, occupies or rents. The only word in this part that implies control of the premises is "occupied". That word appears along with "owned" and "rented" but is there any justification in concluding that as "occupied" requires control, so should "owned" or

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[553] Ibid.

[554] Supra, n. 541.

[555] In Johnson v. British Canadian Insurance Co., [1932] S.C.R. 680, the words "rented or leased" as they appeared in an exclusion in an automobile insurance policy were treated as synonymous terms. "Leased" and "rented" were used interchangeable in Acadia Road Contractors Ltd. v. The Canadian Surety Co., infra, n. 557.

"rented"?

Consider the example concerning a shopping centre given earlier.[556] The insured shopping centre owner would have been liable to the tenants even if its registered office were in Toronto and the shopping centre were in Calgary. There should be no difference in result if the shopping centre were leased to the insured, a subsidiary of the owner, whose registered office is also in Toronto. There is a line of cases dealing with the insured's liability for damage to rented construction equipment that is inconsistent with this position.

In Acadia Road Contractors v. Canadian Surety Co.,[557] the insured, a contractor, was engaged in the construction of a bridge. It was placing concrete girders on piers forming part of the bridge, when a girder fell and damaged two cranes. S. Co. had contracted with the insured to provide the services of the cranes, together with operators. One crane was owned by I Co., the other by S. Co. At the time of the accident, the cranes were being operated by employees of I. Co. and S. Co., but the insured's signalmen had directed the crane operators to lift and move the girder. S. Co. and I Co. sued the insured for the damage to their cranes. The insurers denied coverage on the basis of an exclusion for liability for damage to property "owned, used or occupied by or leased to the Insured." In support of their denial, the insurers relied on a letter sent by S. Co. to the insured enclosing a rental rate brochure which referred to "Mobile Crane Rental Service."

Cowan, C.J., held the cranes were not leased to the insured. The contract between S. Co. and the insured obliged S. Co. to supply two cranes, together with operators, to be used according to the directions given by the insured's signalmen. S. Co. and I. Co. also supplied the fuel and were responsible for repairing and servicing the cranes. It was concluded that possession of the cranes had not passed to the insured. Rather, it had remained with S. Co. and I. Co. It was further held that because "leased" implies an arrangement by which the lessee obtains possession, there was no lease here. The exclusion, therefore, did not apply. The Nova Scotia Court of Appeal endorsed these reasons.

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[556] Supra, n. 546.

[557] (1978), 27 N.S.R. (2d) 605, 41 A.P.R. 605, 88 D.L.R. (3d) 287 (N.S. S.C. A.D.); aff'g (1977), 27 N.S.R. (2d) 608, 41 A.P.R. 608, 81 D.L.R. (3d) 169, [1978] I.L.R. 1118 (para. 1-998) (N.S. S.C. T.D.).

Fraser River Pile Driving Company Ltd. v. Fidelity Insurance Company of Canada[558] is in line with Acadia Road Contractors.[559] In Fraser River, P. Ltd. leased a crane to a contractor. The contractor sub-leased it to the insured. P. Ltd.'s employees operated and serviced the crane. P. Ltd. billed the contractor for the use of the crane. The contractor forwarded the bill to the insured. The crane was damaged due to the insured's negligence. P. Ltd. sued the contractor and the insured. The insurers denied coverage on the basis of an exclusion for liability for damage to property "owned, occupied or rented by the Insured." The court concluded that P. Ltd. had not rented the crane to the insured as there was no contract between P. Ltd. and the insured. Further, the insured never obtained possession of the crane. P. Ltd. was an independent contractor that did not "rent" its crane to anyone. The exclusion did not apply.

Acadia Road Contractors[560] and Fraser River[561] stand for the proposition that "rented", as it appears in the first part of exclusion (h), implies control. If the insured does not have dominion and control over the damaged property, it has not "rented" the property.[562] This is clearly inconsistent with Locke, J.'s position.

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[558] [1973] 1 W.W.R. 418, [1973] I.L.R. 524 (para. 1-519) (B.C. S.C. T.D.).

[559] Supra, n. 558.

[560] Supra, n. 558.

[561] Supra, n. 559.

Insurers are left with a conflict between comments made by Locke, J., in dissent in the Supreme Court of Canada, and the decisions of the Nova Scotia Court of Appeal, and the British Columbia Supreme Court. Locke, J.'s comments concerned a lease of real property, while the lower courts were concerned with leases concerning personal property. To reconcile the conflict, one may conclude that part (1) of exclusion (h) excludes coverage for liability for damage to real property leased by the insured, even if it does not control the property, whereas coverage is excluded in the case of personal property only where the insured does exercise control. It might also be concluded that where the insured leases equipment and an operator, the insured had not "rented" the equipment as that word is used in the insurance policy. "Rented" refers to an arrangement between the insured and the owner of the property which gives the insured the right to control and use the property. One does not control the property when one instructs an employee of the owner of the property as to the tasks the equipment is to perform. When the equipment is supplied to the insured together with an operator, the true agreement between the equipment owner and the insured is a contract for services.

The policy does not distinguish between the rental of real and personal property. It therefore seems more reasonable to argue that "rented" refers to an agreement as to the use of property rather than a contract for services. Until the Supreme Court of Canada resolves the conflict, insurers face the possibility of inconsistent results amongst the various provincial courts. The Nova Scotia and British Columbia Courts are, of course, bound by their own decisions. The other provinces would be reluctant to disagree with them. In the meantime, insureds are best advised to ensure that the owners of the equipment supplied for its use carry sufficient liability insurance, naming them as insureds, with a "no subrogation clause" in the "lease" agreements, to prevent legal action against the insureds for negligent use.

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[562] The American courts have taken a similar position. See: Rice Brothers, Inc. v. Glen Falls Indemnity Co., 263 P. 2d 39 (Calif. App., 1953); Knott v. Soltan, 166 N.W. 2d 91 (Minn., 1969); Traders & General Ins. Co. v. Edwards, 216 F. 2d 441 (10th Cir., 1954), cert. den., 348 U.S. 953; Ins. Co. of North America v. Northwestern Nat. Ins. Co., 371 F. Supp. 550 (E.D. Mich., 1973), aff'd 494 F. 2d 1192 (6th Cir., 1974); Travellers Indemnity Co. v. Equipment Rental Co., 345 S.W. 2d 831 (Tex. App., 1961); Dulbay v. Trans-America Ins. Co., 429 N.Y.S. 2d 449 (App., 1980).

9.2 "PROPERTY USED BY THE INSURED"

Part (2) of the exclusion withdraws from coverage the insured's liability for damage to property that it "uses". It largely duplicates the risk excluded by part (1) of the exclusion since the insureds typically rent or own property which they use. In some situations, such as those involving property held on consignment, on approval, or subject to conditional sales contracts, this will not necessarily be the case. Consequently part (2) has an impact of its own. In what circumstances is property "used" by the insured? As this word appears in an exclusion, it must be given a narrow interpretation. The courts have done this by introducing the concept of control. The insured uses what it controls.

The first Canadian case of significance to consider the concepts of use and control was Dominion Bridge Co. Ltd. v. Toronto General Insurance Co.[563] In that case, the insured contracted with a third party to erect the superstructure of a bridge upon the latter's masonry foundations. Part of the superstructure collapsed and damaged two piers that were part of the third party's masonry work. Coverage for the insured's liability to the third party was denied on several grounds, one of which was an exclusion for liability for damage to "property used, owned or occupied by, rented or leased to, or in the care, custody or control of the insured."[564] This action was brought by the insured to determine if the policy covered its liability to the third party.

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[563] [1963] S.C.R. 362, 40 D.L.R. (2d) 840, 45 W.W.R. 125, [1963] I.L.R. 535 (para. 1-108) (S.C.C.); aff'g 32 D.L.R. (2d) 374, 37 W.W.R. 673, [1962] I.L.R. 300 (para.1-663) (B.C. C.A.); rev'g 34 W.W.R. 289, 27 D.L.R. (2d) 486, [1961] I.L.R. 123 (para.1-025) (B.C. S.C. T.D.).

The trial judge, Wilson, J., and two judges of the British Columbia Court of Appeal, Desbrisay, C.J.B.C., and Sheppard, J.A., were the only justices hearing the case who commented on this ground of the coverage denial. At trial, Wilson, J., held that as the insured had used the piers to place its superstructure, the exclusion applied. Desbrisay, C.J.B.C., disagreed. If this was true, he said, there would be no coverage for contractors as almost every time someone builds something, it is built on property. It could not be said that property which is simply incorporated or utilized is "used by" the insured. "Use" implies a possessory or proprietary right. Sheppard, J.A., on the other hand, held that "use" merely means employing for one's own purpose. The insured deliberately adapted these piers to its method of construction, and used them for its own purpose, as opposed to their normal use as piers. The ordinary meaning of "use" is not limited by a possessory or proprietary right and there is no indication from the policy that such a meaning should be imposed.

Sheppard, J.A. rejected an attempt to encumber the meaning of "use" with the concept of control. If one puts property to one's service, that property is used. Subsequent courts have wrestled with the problem of whether the exclusion was indeed that broad.

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[564] Ibid., at 379 (32 D.L.R. (2d)).

In Watts v. Centennial Ins. Co.,[565] the insured, a passenger in a car, caused property damage to another car by opening the car door in the other's path. The insured was covered by a comprehensive personal liability rider containing an exclusion for liability arising out of "the use...of...land motor vehicles."[566] Coverage was denied on the grounds that the insured "used" the car by opening the door. The court rejected the insurer's position. It held that if the insured does not control property, it does not "use" it. An insured controls property where it works it, manipulates it, operates it, handles it, or employs it. An insured does not "use" a car by simply opening the door. Only if he is driving the car, would opening the door be part of its use.

In Fraser River,[567] the insured sub-contractor agreed with a general contractor to build a working trestle out into a river. A third party contracted with the general contractor to remove debris that was piling up against the insured's trestle. The third party supplied a crane and a crane operator. The insured's employees directed the crane operator. The trestle collapsed causing the crane to fall into the river. Coverage for the insured' s liability to the third party was denied, in part, on an exclusion for liability for damage to property used by the insured. The court rejected this part of the denial, holding that "the insured does not "use" property unless *the insured* puts the property to his own service or the purpose for which it is ordinarily intended."[568] The insured did not use the crane as he was not in control of it, and therefore did not put it to his own service. If the insured does not control property, it does not use it.

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[565] (1967), 62 W.W.R. 175, 65 D.L.R. (2d) 529, [1969] I.L.R. 315 (para. 1-220) (B.C. S.C. T.D.).

[566] Ibid. at p. 531 (D.L.R.).

[567] Supra, n. 559.

[568] Ibid. at 527 (I.L.R.).

In Acadia Road Contractors,[569] one of the grounds upon which the insurer denied coverage was that the insured's liability to the third party was for property that it used. The court considered Dominion Bridge,[570] Watts,[571] and Fraser River.[572] It noted that the insured's signalmen simply directed movement of the crane's load--not the crane itself--and that Fraser River,[573] requires the insured to actually manipulate the crane's gears and levers before one can conclude that the insured actually uses the crane. As in Fraser River,[574] the Court therefore concluded that the exclusion did not apply.

Following Watts,[575] Fraser River,[576] and Acadia Road Contractors[577] it seemed that Sheppard, J.A.'s views as to the meaning of "used by" had been completely discredited. That was not the case as his interpretation of "used by" was the thrust of the coverage denial in Kenting Drilling Ltd. v. General Accident Assurance Co. of Canada.[578]

In that case, the insured and a third party were sub-contractors, working under contract with C. Co. on oil exploration in the Canadian Arctic. C. Co. required the insured to drill seismic shot holes in certain locations. The third party was to to bring the insured's equipment to these locations by helicopter. C. Co. decided which of the insured' employees would assist the third party's pilots. The employees directed the pilots as to where the equipment should go by using hand signals. Due to the negligence of one of the employees, a helicopter was damaged.

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[569] Supra, n. 558.
[570] Supra, n. 564.
[571] Supra, n. 566.
[572] Supra, n. 559.
[573] Ibid.
[574] Ibid.
[575] Supra, n. 566.
[576] Supra, n. 559.
[577] Supra, n. 558.
[578] 26 A.R. 90, [1977] 5 W.W.R. 68, 102 D.L.R. (3d) 99, [1980] I.L.R. 537 (para. 1-1168) (Alta. S.C. T.D.).

The insurer denied coverage for the insured's liability for the damage on the ground that the helicopter was property "used" by the insured as an integral part of its operations. The court rejected that argument on the authority of Fraser River.[579] As the insured's employees were not flying the helicopter, the court found that they did not control it, and therefore did not use it, even though the insured required a helicopter to perform its contract. The court suggested that an insured uses property when it puts it to its service or controls it. The better view is that "use" involves both putting property to one's service and controlling it; otherwise, Sheppard, J.A.'s analysis would still be correct, despite Watts,[580] Fraser River[581] and Acadia Road Contractors[582]

To conclude, the second part of this exclusion withdraws from coverage the insured's liability for damage to property that it "uses". The insured "uses" property when it is put to the insured's service and the insured physically controls it by manipulating it or working with it as part of the insured's operations. If the insured merely directs others who work or manipulate the property, the insured does not "use" it, even though without that property, the insured could not perform its contract or service.

9.3 "CARE, CUSTODY AND CONTROL, OR PROPERTY AS TO WHICH THE INSURED IS FOR ANY PURPOSE EXERCISING PHYSICAL CONTROL"

Part (3) of the exclusion withdraws from coverage the insured's liability for property in its care, custody or control. It applies to property such as leased premises; rented equipment, such as construction cranes, computers or other electronic data or processing equipment, and, once again, property held on consignment.[583] There are two reasons for this exclusion. Firstly, it excludes coverage for damage to property which should be covered under property related coverage, such as a bailee's policy, fire legal liability insurance, or a form of inland marine coverage for property left in the hands of others for servicing.[584] Secondly, it excludes certain types of perils which are generally considered to be inherent business risks, and hence uninsurable.[585] Examples are a tailor's liability to a customer for improperly ironing a pair of slacks,[586] or delicate machinery being damaged by the insured due to excessive force during servicing.[587]

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[579] Supra, n. 559.
[580] Supra, n. 566.
[581] Supra, n. 559.
[582] Supra, n. 558.

As with the exclusion for liability arising for damage to property "used" by the insured, the care, custody or control exclusion could nullify the usefulness of the policy if interpreted broadly. For this reason, and also because exclusions must be interpreted narrowly, three major principles have evolved to limit its scope. To appreciate these principles, it is necessary to consider the myriad of fact situations from which they were derived:

(1) The insured was cleaning a rug in a third party's house. The rug was fastened to the floor with tacks, and a half-round wooden border strip. A destructive fluid escaped from the insured's cleaning machine, ruining the rug. The court held that the rug was not in the insured's care, custody or control, and that the insured's liability to the third party was covered: Indemnity Ins. Co. v. Excel Cleaning Service (Supreme Court of

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[583] Insurance Bureau of Canada, Course #13: *Insurance Against Liability*, (Toronto, 1983), at p. 8-2.
[584] Ibid, at p. 7-3.
[585] Ibid.
[586] Ibid.
[587] Ibid.

Canada, 1954)[588]

(2) The insured sandblasted the exterior walls of a third party's building. In the process, it damaged the windows. The court held that the walls, but not the windows were in the insured's care, custody and control; hence, the policy covered the insured's liability to the third party: R.D. McCollum Ltd. v. Economical Insurance Co. (Ontario High Court, 1962)[589]

(3) The insured contracted to clean an oil storage tank that was 40 feet high and 90 feet in diameter, and had a capacity of 56,000 barrels of oil. The insured damaged the tank while cleaning it. No one but the insured's workmen were about when the damage occurred. The court held that the tank was not in the insured's care, custody or control and that therefore the insured's liability to the third party was covered: Interprovincial Pipe Line Co. v. Sellers Oil Field Ltd.; Lloyds of London et al., Third Parties (Manitoba Court of Appeal, 1976).[590]

(4) The insured, a plumbing and heating contractor, agreed with a general contractor to assume the latter's liabilities to a project owner. The project owner had agreed that the general contractor would have the care of the building until the project was completed. The insured's employee negligently caused a fire while installing duct work. The court held that the building was not in the insured's care, custody and control, and its liability was not excluded: T.W. Thompson Ltd. v. Simcoe & Erie General Insurance Co.

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[588] [1954] S.C.R. 169. [1954] 2 D.L.R. 721, (S.C.C.); aff'g, [1953] O.R. 9, [1953] 1 D.L.R. 513, (Ont. C.A.); rev'g the unreported decision of the Ontario High Court in favour of the insurer. The insurer based its coverage denial on the care, custody and control exculsion. At trial, it sought leave to amend its pleadings and argue the contractual liability exclusion. Leave was denied. The policy did not contain a work performed exclusion.

[589] (1962), 34 D.L.R. (2d) 386 (Ont. H.C.).

[590] Supra, n. 547.

(Ontario Court of Appeal, 1976)[591]

(5) A third party delivered a trailer van to the insured, who was in the business of repairing trailers and vans. The insured was to repair a dolly located underneath the van. The van doors were padlocked and the insured did not have keys to open them. In the course of the repairs, the van caught fire, damaging the contents. The court held that the contents were not in the insured's care, custody or control; hence, the insured's liability for their damage and destruction was not excluded: Neil's Trailer & Equipment Ltd. v. Butler Maveety & Meldrum Ltd. and Maryland Casualty Co. (Alberta Supreme Court, Trial Division, 1977).[592]

(6) The insured was using hand signals to direct a third party's helicopter pilot as to where it should place the insured's drilling equipment. There was no contract or agreement between the insured and the third party. The helicopter was damaged due to the negligence of one of the insured's employees. The court held that the helicopter was not in the insured's care, custody or control: Kenting Drilling Ltd. v. General Accident Assurance Co. of Canada (Alberta Supreme Court, Trial Division,1977)[593]

(7) A third party supplied cranes complete with operators to perform work as directed by the insured contractor. The third party supplied fuel and serviced the cranes. The cranes were damaged due to the insured's negligence. The court held that the cranes were not in the insured's care, custody or control: Acadia Road Contractors Ltd. v. The Canadian Surety Co. (Nova Scotia Court of Appeal, 1978).[594]

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[591] (1976), 12 O.R. (2d) 184, 68 D.L.R. (3d) 240, [1976] I.L.R. 90 (para. 1-734) (Ont. C.A.); aff'g (1975) 8 O.R. (2d) 455, 58 D.L.R. (3d) 327, [1974] I.L.R. 1187 (para. 1-678) (Ont. H.C.).

[592] (1977), 2 Alta. L.R. (2d) 187, 75 D.L.R. (3d) 151, (Alta. S.C. T.D.).

[593] Supra, n. 579.

[594] Supra, n. 558.

(8) The insured, a carrier, delivered goods for storage at a warehouse. The insured could retrieve them any time. The goods were damaged while in the care of the warehousman. The court held that the warehousman, not the insured, had the care, custody and control of the goods. Sumitomo Canada Ltd. v. The Canadian Indemnity Co. Ltd. (British Columbia Court of Appeal, 1982)[595]

At first glance, there does not appear to be any common link between these cases. However, on closer analysis, three principles emerge.

Firstly, "care" as it appears in the phrase "care, custody or control" does not refer to the common law duty of care which is the foundation of the insured's tortious liability. Speaking for the court in the Neil's Trailer[596] case, Moore, J., as he then was, stated, "[t]o care for something, means to preserve it or look after it."[597]

Secondly, the concept of physical control is introduced by the concluding words "...as to which the insured is for any purpose exercising physical control..." In order for the exclusion to apply, the insured must have "actual possession of the property that was the subject of the damage."[598] This makes sense as the insured cannot care for something that it does not possess.[599] Consequently, if the insured is a bailee of the damaged property, the "care, custody or control" exclusion will apply.[600] "Physical" control implies control over a material object rather than intellectual control of a person who operates an object.[601] This explains Acadia Road Contractors[602] and Kenting Drilling.[603] In both cases, the insureds' employees were not operating the equipment at the time it was damaged. They were directing the third parties' equipment operators, in much the same fashion as a passenger directs a taxi-driver regarding which route to follow.[604] He directs the driver but does not control the vehicle.[605]

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[595] [1982] 5 W.W.R. 762, 138 D.L.R. (3d) 173, [1983] I.L.R. 6140 (para. 1-1594) (B.C. C.A.); aff'g [1981] 5 W.W.R. 508, 125 D.L.R. (3d) 356, [1981] I.L.R. 576(para. 1-1457) (B.C. S.C. T.D.).

[596] Supra, n. 593.

[597] Ibid. at p. 154 (D.L.R.).

[598] Indemnity Ins. Co. v. Excel Cleaning, supra, n. 589, per Laidlaw, J.A., of the Ontario Court of Appeal, at p. 514 ([1953] 1 D.L.R.). This position was endorsed by the Supreme Court of Canada.

[599] Neil's Trailer & Equipment Ltd. v. Butler Maveety et al. supra, n. 593, at p.154 (D.L.R.).

[600] Sumitomo Canada Ltd. v. The Canadian Indemnity Co. Ltd., supra, n. 596.

A sub-rule emerges from this principle. Temporary access is not a substitute for physical control. If the insured contracts with a third party to do work on or in a building or structure, the third party usually grants the insured temporary access to perform that work. This does not constitute physical control. However, if the insured is given permission to permit or deny access, then it does exercise physical control.[606] This explains Interprovincial Pipe Line,[607] and T.W. Thompson Ltd.[608] In neither of these cases were the insureds given the power to admit or deny access. As a result, it is seldom that the "care, custody and control" exclusion applies to the insured's liability for damage to buildings.

In the Excel Cleaning[609] case, the insured was given temporary access to a rug to clean it. The insured did not assume possession of the house as it was only allowed to enter to clean the rug. It did not assume possession of the rug as it was tacked down.

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[601] "Physical" is defined in the Shorter Oxford English Dictionary as: of or pertaining to material nature, pertaining to or connected with "matter"; material, opposite to mental, spiritual.

[602] Supra, n. 558.

[603] Supra, n. 579.

[604] Acadia Road Contractors Ltd. v. The Canadian Surety Co., supra, n. 558 at p. 182 (81 D.L.R. (3d)).

[605] Ibid.

[606] Interprovincial Pipe Line Co. v. Sellers Oil Field Services Ltd: Lloyd's of London et al., Third Parties. supra, n. 547, at 732 (58 D.L.R. (3d)).

[607] Ibid.

[608] Supra, n. 592.

[609] Supra, n. 589.

The court held that the insured's temporary access to the rug was not sufficient to invoke the "care, custody and control" exclusion. This was an important decision for insureds engaged in on-location servicing: Unless the insured is given complete dominion and control over the property on which the service is performed, the "care, custody and control" exclusion does not apply. As noted in the introduction to this Chapter, this conflicts with the insuring intent, and as a result part four of this exclusion was added to exclude this risk.

The third principle emerging from these cases relates to the second principle: the "care, custody and control" exclusion only applies to property directly under the physical control of the insured. This was ably summarized by the court in Goswick v. Employer's Casualty Co.:[610]

> This is the language of the traditional manufacturers' and contractors' comprehensive liability policy form. If the insured under such a policy is repairing or installing item #1 adjacent to item #2 and within the premises of a building, when his negligence causes damage to items #1 and #2, as well as the building, the exclusion denies coverage only as to that property damaged which was within his possessory control. *The cases have limited this "control" to the particular object of the insured's work, usually personalty, and to other property which he totally and physically manipulates.*
>
> The general rule has often been stated to this effect: where the property damaged is merely incidental to the property upon which the work is being performed by the insured, it is not considered as in such "care, custody, or control" of the insured to be excluded under the policy. (Emphasis added)

This principle was applied in the R.D. McCollum Ltd.[611] case. The insured's contract in that instance defined its work as the walls. The windows were located beside the area on which the insured worked, but were not directly under his physical control. The damaged windows were considered to be incidental to the property upon which the insured performed its work. This principle was also applied in Neil's Trailer[612] in which the insured had direct control of the exterior of the van, but not its contents.

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[610] 440 S.W. 2d 287 (Tex., 1969), at 289.
[611] Supra, n. 589.

The three principles emerging from these cases are easy to state, but difficult to apply. For example, R.D. McCollum Ltd.[613] appears to conflict with the Interprovincial Pipe Line,[614] and T.W. Thompson Ltd.[615] In R.D. McCollum,[616] the insured was held to have the care, custody and control of the walls, but not the windows. How can an insured be in possession of part of the exterior of a building? In Interprovincial Pipe Line[617] and the T.W. Thompson Ltd.[618] the courts considered the damaged structure as a whole. Although the different conclusion can be explained by stating that the courts applied two different principles, we are left with little guidance as to what principle will be applied in a given case. As a result, this is perhaps one of the most difficult exclusions in the entire policy, as it is extremely difficult to determine when the exclusion applies.

The last word on this exclusion belongs to Gaulkin, J.A.D., speaking for the Appellate Division of the Superior Court of New Jersey, in Elcar Mobile Homes Inc. v. D.K. Baxter Inc:[619]

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[612] Supra, n. 593.

[613] Supra, n. 589.

[614] Supra, n. 547.

[615] Supra, n. 592.

[616] Supra, n. 590.

[617] Supra, n. 547.

[618] Supra, n. 592.

[619] 169 A. 2d 509 (N.J. App., 1961), at p. 516.

> We are of the opinion that what constitutes "care, custody or control" or "exercising physical control" depends not only upon whether the property is realty or personalty, but as well as on many other facts, such as the location, size, shape and other characteristics of the property, what the insured is doing to it and how, and the interest in and relation of the insured and others to it...[all these circumstances]...may be material in a given situation; but when they are, they are merely facts (more or less important depending upon the circumstances) to be taken in conjunction with all other facts, in determining whether there is exclusion.

9.4 DAMAGE TO PERSONAL PROPERTY OR FIXTURES AS A RESULT OF WORK PERFORMED THEREON BY THE INSURED

Part (4) of the exclusion was added to the policy in response to a 1954 Supreme Court of of Canada decision, Indemnity Insurance Co. of North America v. Excel Cleaning Service.[620] That case held that the care, custody or control exclusion did not apply to an insured performing an on-location service contract. This result was contrary to the insuring intent of the CGL Policy. It transformed the policy into a guarantee of an insured's performance of its on location service contracts. This is a trade risk and as such was not intended to be covered. This part of exclusion (h) attempts to remove the effect of this decision by excluding the insured's liability for damage to personal property or fixtures caused by the insured while servicing, repairing, adding to, or dismantling that property.[621]

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[620] Supra, n. 589.

[621] The fourth part of exclusion (h) is related to the "work performed" exclusion, discussed in Chapter 11.

Few decisions have interpreted this part of exclusion (h).

The issue of whether a standing crop is "personal property" within the meaning of this part of the exclusion, was considered in Hoegy v. General Accident Assurance Co. of Canada.[622] The insured, engaged in the crop spraying business, sprayed a third party's flax crop while it was standing in the field. The crop died as the spraying was done when it was too far advanced. The third party claimed against the insured. The insured asked its insurer to defend. The insurer denied coverage on the basis of an exclusion similar to this part of exclusion (h).

The court held that growing crops have been characterized as both real and personal property. On the day the crop was sprayed, it could have been characterized as either. The application of the exclusion to the fact situation resulted in an ambiguity. The *contra proferentum* principle was applied in favour of the insured, and the exclusion was held inapplicable. In further support of its reasons, the court noted that the nature of the insured's business was listed as "crop spraying". The insurer knew the type of business it was engaged in. To apply the exclusion to this claim would negate the very liability which prompted the insured to purchase CGL insurance.

This decision transformed the CGL policy into a performance bond. The risk that a crop may be sprayed when it is too far advanced is an uninsurable trade risk and should be considered as part of the cost of doing business. It is obvious that the result in this case turned on the court's sympathy with the insured who was sold a policy that did not and could not apply to his operations. The proper result would have been to uphold the coverage denial, forcing the insured to take action against its agent or broker.

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[622] (1977), 75 D.L.R. (3d) 44 (Ont. H.C.).

Three years later, the Ontario High Court rendered a decision that resembled Hoegy.[623] In MacDougall v. Casualty Co. of Canada,[624] the insured, who repaired machinery, destroyed a machine while repairing it. The insurer stated that the third party claim for the value of the destroyed machine was excluded by this part the exclusion. The court held that if the insurer was permitted to apply the exclusion in this manner, the insured would have no liability insurance for claims arising from its business. Further, this part of the exclusion contradicted the entire tenor of the CGL Policy. This contradiction created an ambiguity which must be resolved in favour of the insured by rendering this part of the exclusion inoperative.

In MacDougall,[625] the court rewrote the policy to place the claim within coverage. Once again, the policy became a guarantee of the insured's workmanship. This did more violence to the insuring intent than the position advocated by the insurer. It indicated a complete lack of understanding of the policy. The result in the case was again dictated by the court's sympathy for the insured.

Faced with decisions such as Hoegy,[626] and MacDougall,[627] insurers have chosen to unilaterally limit the scope of this exclusion by applying it only to the specific part which malfunctioned and damaged the piece of personal property or fixture. For example, the insured, a furnace repairman, is called to a third party's residence to repair the furnace. The insured determines that the problem is a faulty valve. The insured replaces the valve and leaves. Later that day, the valve malfunctions, and the furnace explodes, destroying the third party's home. The third party sues the insured for the destruction of his home. The insured's liability to pay damages for the destruction of the home is covered. The furnace was a fixture serviced by the Insured. However, the insurers would only consider the valve to be the part that the insured worked on, and apply the exclusion only to the valve, worth, perhaps, $4.95. The policy would cover the insured's liability to the third party, with the exception of the valve. Where the insurer has interpreted this exclusion in this manner in the past, and the insured purchases a policy on the strength of that practice, the insurer will not be permitted to apply a broad interpretation to the exclusion in the event that the insured presents a claim for coverage that is affected by this exclusion. This is the conclusion of the court in Weston Ornamental Iron Works Ltd. v. The Continental Insurance Co.[628]

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[623] Ibid.

[624] Ontario High Court, Reid, J., October 19, 1980, unreported.

[625] Ibid.

[626] Supra, n. 623.

[627] Supra, n. 625.

In that case, the insured welding company purchased a CGL Policy from the insurer's agent. The agent told the insured that part four of the exclusion would only exclude the specific item being welded by the insured's employees. Other than that part, the insured's liability for damage to the machine would be covered. A third party claimed against the insured for the value of a bulldozer that was destroyed by a fire which began when one of the insured's employees was welding a link on one of the tracks of the bulldozer. The insurer denied coverage on the grounds that this part of the exclusion applies to the single item of personal property and there is no justification in subdividing the piece of equipment to achieve a result that would take the claim outside of the exclusion. The court heard evidence indicating that hundreds of claims had been paid by the insurer according to the interpretation upon which this policy had been sold. The court noted that this practice did not bind the insurer, but it created an ambiguity which had to be resolved in favour of the insured. It also noted that the interpretation advocated by the insurer would exclude "...the most obvious liability inherent in the insured's business."[629]

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[628] [1981] I.L.R. 477 (para. 1-1430) (Ont. C.A.).

[629] Ibid. at p. 479.

To conclude, adverse judicial construction of this exclusion has forced most insurers to limit the scope of this exclusion by applying it only to that part of the personal property or fixture serviced by the insured that malfunctioned.

9.5 CONCLUSION

Exclusion (h) is divided into four parts, each of which is read as if it were a separate exclusion.[630] Each part is directed at removing from coverage hazards that may be covered under other forms of insurance, as well as ensuring that the policy does not cover uninsurable trade risks, which are part of the cost of doing business.

The difficulty associated with part one lies with the meaning of "occupied" and "rented". An insured "occupies" a commercial building or structure where it is used over a period of time for the purposes for which it is designed.[631] The controversy surrounding "rented" lies primarily with the use by the insured of equipment belonging to another. If equipment is supplied with an operator or mechanic, the issue is whether the insured contracted for services or for the rental of a machine. Some courts address this issue by asking whether the insured had control over the operation of the machine or simply directed the operator.[632] If the insured operated the machine, they conclude that the machine was rented. On the other hand, there is some authority from the Supreme Court of Canada that a court need only look at the agreement between the parties. If that agreement is a rental agreement, the exclusion applies, regardless of any other considerations.[633] It is difficult to advise with certainty which way a given court would rule on this point, but it appears that if an insured incurs liability for damage to equipment or other types of personal property that it does not own and has acquired on terms from others, the issue of whether it is "rented" will be decided by the measure of control the insured exercised over that equipment.

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[630] Stevenson v. Reliance Petroleum, supra, n. 541; and Givers v. Baloise M. Ins. Co., supra, n.543.

[631] Interprovincial Pipe Line Co. v. Seller's Oil Field Service Ltd. et al, supra, n. 547.

[632] Acadia Road Contractors Ltd. v. The Canadian Surety Co., supra, n. 559; Fraser River Pile Driving Company Ltd. v. Fidelity Insurance Co. of Canada, supra, n. 559.

Insurers often argue parts (2) and (3) of this exclusion as alternate grounds for maintaining coverage denials. To determine whether the insured "used" property, or whether property was within the "care, custody or control" of the insured, the same question is posed: did the insured exercise physical control over the property, and incorporate it into its operations?[634] If an insured acquires a machine that is operated by one of its employees to aid in the performance of a contract, that machine is both used by the insured, and in its care, custody or control.[635] Temporary access to property, for a limited purpose, is not sufficient to conclude that the property is within the insured's physical control.[636] Further, if the insured damages property that is adjacent to property that it is working on, and the damaged property is not directly under its physical control, the property is neither used by the insured nor is it in its care, custody, or control.[637]

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[633] Stevenson v. Reliance Petroleum, supra, n. 541, per Locke, J.

[634] Watts v. Centennial Ins. Co., supra, n. 566; Fraser River Pile Driving Co. Ltd. v. Fidelity Ins. Co. of Canada, supra, n. 559; Acadia Road Contractors Ltd. v. The Canadian Surety Co., supra, n. 579; Kenting Drilling Ltd. v. General Accident Assurance Co. of Canada, supra, n. 579.

[635] Acadia Road Contractors Ltd. v. The Canadian Surety Co., supra, n. 559; and Indemnity Ins. Co. v. Excel Cleaning, supra, n. 589.

[636] Indemnity Ins. Co. v. Excel Cleaning, supra, n. 589; Interprovincial Pipe Line v. Seller's Oil Field Service Ltd et al, supra, n. 547.

[637] R.D. McCollum Ltd. v. Economical Insurance Co., supra, n. 590.

Given that the insured "uses" property that is in its "care, custody or control", the exclusion for liability for damage to property "used by" the insured should be deleted from the policy as it is redundant. That would leave insurers with the myriad of factual problems which give rise to a consideration of the care, custody or control exclusion. It is extremely difficult to advise with any degree of certainty whether a claim will be excluded by the "care, custody or control" exclusion. In each case, the facts govern and it is guess work to determine which facts will take precedence over another.[638]

Part (4) of exclusion (h) excludes the insured's liability for damage to personal property or fixtures as a result of work performed thereon by the insured. As this hazard is excluded by exclusion (j),[639] this part of exclusion (h) is also redundant. There is no explanation as to why this clause remains part of the policy. The few decisions interpreting this part of exclusion (h) have completely ignored the purpose of the exclusion which is to prevent the policy from acting as a guarantee of the insured's service contract. These cases hold that this part conflicts with the general tenor of the policy, and conclude that the resulting ambiguity must be resolved in favour of the insured. Hence, this part of exclusion (h) is ignored. Faced with this judicial attitude, most insurers have limited the scope of the exclusion. Rather than applying it to the entire machine that was destroyed by the insured's negligence while servicing it, their position is that the exclusion only applies to the particular part of the machine which failed.[640]

This description of the judicial treatment of exclusion (h) indicates that (a) the insuring intent of the exclusion is ignored; (b) the language is tortured to extend coverage to the situations that come before the courts; and (c) faced with this onslaught of adverse judicial treatment, the insurers have unilaterally limited the scope of the exclusion. The better judicial response to this exclusion would be to remain honest to the insuring intent by giving effect to each part of the exclusion and deny coverage where a transaction runs afoul with the exclusion. This would result in litigation between the insureds whose coverage denial has been maintained and the agents and brokers who sold them the policies. Agents and brokers would be forced to come to grips with this exclusion and the policy as a whole and recognize when an insured needs additional protection over and above the standard coverage of the CGL policy.

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[638] Elcar Mobile Homes Inc. v. D.K. Baxter Inc., supra, n. 619.

[639] This exclusion is discussed in Chapter 11.

[640] An example of this interpretation is Weston Ornamental Iron Works Ltd. v. The Continental Ins. Co., supra, n. 629.

Chapter 10

Exclusion (i): The "Product Itself" Exclusion

Exclusion (i), the "product itself" exclusion, provides:

> This insurance does not apply to:
>
> . . .
>
> (i) **property damage** to the **Named Insured's products** arising out of such products or any part of such products;

"Property damage" and the "Named Insured's products" are defined in the definition section of the policy shell. The "property damage" definition was considered in Chapter 5. "Named Insured's products" is defined as follows:

> "Named Insured's products" means goods or products manufactured, sold, handled, or distributed by the **Named Insured** or others trading in his name, including any container thereof (other than a vehicle), but shall not include a vending machine or any property other than such

container, rented to or located for use of others but not sold.

This exclusion is often considered together with exclusion (j), the "work performed exclusion", which reads:

> This insurance does not apply to:
>
> ...
>
> (j) **property damage** to work performed by or on behalf of the **Named Insured**, arising out of the work or any portion thereof, or out of the materials, parts or equipment furnished in connection thereof.

"Property damage" and "Named Insured" are defined terms.

Prior to the 1966 amendment of the American standard form CGL Policy, the product itself and the work performed exclusion were joined in one exclusionary clause:

> This policy does not apply:
>
> ...
>
> [to]...any goods or products manufactured, sold, handled or distributed or premises alienated by the Named Insured, or work completed by or for the Named Insured, out of which the accident arises.[641]

There was a good deal of controversy as to the meaning of the phrase "out of which the accident arises". Several courts interpreted this exclusion to mean that where a defect in one part of the insured's product, composed of several distinct parts, damages the balance, the exclusion operates to exclude the damage to that part causing the damage, as that was the part "out of which the accident...[arose]..."[642] This interpretation was contrary to the insuring intent, as it placed the insurer in the position of a guarantor of all parts of the insured's product, except that part "out of which the accident arose."[643]

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[641] As quoted in Heyward v. American Casualty Co. of Reading Pa., 129 F. Supp. 4 (E.D. S.C., 1955).

[642] S.L.Rowland Construction Co. v. St. Paul Fire & Marine Ins. Co., 434 P. 2d 725 (Wash., 1967); Owens Pacific Marine Inc. v. Ins. Co. of North America, 90 Cal. Rptr. 826 (App., 1970).

In 1966 the policy was revised, eliminating this ambiguity. The exclusion was divided into two, creating separate exclusions for property damage to the Named Insured's products and for work performed by the insured. Each exclusion specifically provides that coverage will not be extended to property damage to the product or work as a whole or any portion thereof. As before, each exclusion subtracts property damage to the Named Insured's work or product from coverage, not liability for property damage or bodily injury because of the faulty product or defective work. These changes are reflected in the 1978 I.B.C. CGL model wording, which is identical to the current American standard form wording. The difference between exclusion (i), the "product itself" exclusion and exclusion (j), the "work performed exclusion", is that "work" refers to the manner in which the job was done, and "product" refers to the item made or sold.[644] The "product itself" exclusion is the subject of the remainder of this Chapter. The "work performed" exclusion is the subject of Chapter 11. It is best to separate discussions of these exclusions as they are distinct, although related exclusions.

Both of these exclusions exclude the same risk. They were originally placed in the American standard form policy to eliminate coverage for business risks:

> ...[T]he insured contractor can take pains to control the quality of goods and services supplied. At the same time he undertakes the risk that he may fail in this endeavour and thereby incur contractual liability whether express or implied. The consequence of not performing well is part of every business venture; the replacement or repair of faulty goods and works is a business expense to be borne by the

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[643] See Obrist, W.J., "*New Comprehensive General Liability Insurance Policy*," DRI Monograph, General Liability Insurance--1973 Revisions, (Vol 1974, No. 1), at 38, 43.

[644] Indiana Ins. Co. v. Dezutti, 408 N.E. 2d 1275, at 1280.

insured contractor to satisfy customers.[645]

The CGL Policy does not function as a guarantee of the effectiveness of the insured's product. If it did provide protection against the insured's liability to repair or replace his own product or work, the policy would, in effect, be transformed into a guarantee of the quality of the insured's products, as well as a guarantee of the insured's contractual performance--a performance bond. This is contrary to the insuring intent:[646]

> Where the tradesman commonly absorbs the cost attendant upon the repair of his faulty work, the accidental injury to property or persons substantially caused by his unworkmanlike performance exposes the contractor to almost limitless liabilities. While it may be true that the same neglectful craftsmanship can be the cause of both a business expense to repair and a loss represented by damage to persons and property, the two consequences are vastly different in relation to sharing the cost of such risks as a matter of insurance underwriting.[647]

One commentator defined the products liability coverage offered by the CGL Policy as follows:

> The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable. The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, it not what the coverages in question are designed to protect against. The coverage is...not for contractual liability of the insured for economic loss because the product or completed work is not that for which the

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[645] Weedo v. Stone-E-Brick Inc., 405 A. 2d 788 (N.J., 1979), at 791.

[646] See Indiana Ins. Co. v. Dezutti, supra, n. 644; I.G.A. Construction Corp v. Charter Oak Fire Ins. Co., 414 N.Y.S. 2d 385 (App., 1979); Herfeldt v. Robinson, 290 S.E. 2d 896 (W.Va., 1982); Vernon Williams & Son Construction Inc. v. The Continental Ins. Co., 591 S.W. 2d 760 (Tenn., 1979); Bor-Son Building Corp. v. Employers Commercial Union, 323 N.W. 2d 58 (Minn., 1982).

[647] Supra, n. 645.

damaged person bargained.[648]

Accordingly, the coverage agreements read with exclusions (i) and (j) indicate that the CGL Policy will not provide coverage for the insured's liability to repair or replace his defective product or work after either has caused an accident resulting in loss to another. However, should that accident also cause damage to other property, or bodily injury to others, the insured's liability is covered. An example taken from the case of Liberty Building Co. v. Royal Indemnity Co.,[649] clarifies this point. The insured contractor builds a house with stucco siding. The stucco is improperly mixed causing rain water to saturate it. A piece of the stucco falls off the wall and injures a child playing beside the house. The policy covers the insured's liability for the child's injuries but does not cover the replacement of the stucco. Additionally if the water from the exterior walls saturates the dry-wall, damaging a painting hanging inside the house, the policy would cover the insured's liability for the cost of repairing the dry-wall and the painting.[650]

What follows is a discussion of the definition of "named insured's products" and some comments with respect to the difficulties of applying this exclusion.

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[648] Henderson, "*Insurance Protection for Products Liability and Completed Operations -- What Every Lawyer Should Know*" (1971), 50 Neb. L. Rev. 415, at p. 441.

[649] 2 Cal. Rptr. 329 (App., 1960), at p. 331-332.

[650] Canadian courts appear to appreciate the intent of this exclusion. In Erie Concrete Products Ltd. v. Canadian General Insurance Co.,[1969] 2 O.R. 372, 5 D.L.R. (3d) 397, [1969] I.L.R. 692 (para. 1-270) (Ont. H.C.), the insured manufactured sewer pipe, and sold some of its pipe to the third party, a general contractor who was installing it as part of a construction contract it held with the City of Brantford. The pipe cracked after the third party put it into the ground. The third party dug up the pipe, replaced some sections and placed reinforced concrete over others. The insured reimbursed the third party for equipment,.labour, and material needed. The insurer denied coverage for this liability. The court upheld this denial on the basis that the damage complained of was to the insured's own product. The judgment does not indicate if "property damage" was defined, or the wording of the exclusion relied upon. Although the result is in line with the intent of the CGL policy, it gives little insight as to future interpretation of CGL wording. Under the 1978 I.B.C. CGL model wording, the facts considered should have resulted in a coverage denial. The damage is physical injury to tangible property, which must be assumed was caused by an accident (there was no finding to the contrary). The sale of pipe would have incorporated the sale of goods legislation pertaining to the warranty of fitness for purpose. The liability for this damage is not excluded by the contractual liability exclusion as there is an exception for liability arising from a warranty of fitness. The liability would be withdrawn by the product itself exclusion as the property damaged was the named insured's products.

10.1 THE DEFINITION OF "NAMED INSURED'S PRODUCTS"

(a) "Goods or Products"

In the commercial world, "goods or products" are the tangible or material units in which the insured trades or deals. The qualifiers, "manufactured, sold, handled, or distributed" do not broaden the ordinary meaning of these words.[651] If the insured sells an item or distributes it, that item is its "good or product", notwithstanding that this is not the good or product in which it primarily deals[652] or that the insured's ordinary operations do not relate to the selling, manufacturing, handling, or distributing of merchandise.[653] In Smith v. Maryland Casualty Co.,[654] a sling-shot sold at a church's annual bazaar injured a small boy. It was argued that the sale of the sling-shot was merely incidental to the operation of the church and that the injury complained of should not be excluded. The court rejected this, holding that. the exclusion applies to all sales of goods to the public, whether they are incidental or a substantial part of the insured's business--even if the insured dabbles in a mercantile venture once a year and for a worthy cause.[655]

What is the insured's "good or product" in the case of a general contractor who contracts with the project owner to build a building, but who only installs the electrical system and sub-contracts the rest? Is it the electrical system or the building? The American courts are divided on this issue.

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[651] Paxton-Mitchell Co. v. Royal Indemnity, 569 P. 2d 581 (Ore., 1977), at 586. This definition is Henderson's, supra, n. 648, at 429-430.

[652] Smith v. Maryland Cas. Co., 229 A. 2d 120 (Ma. App., 1967), where the eloquence of the court matches the best of Lord Denning.

[653] Ibid.

[654] Ibid.

[655] In Novak v. All City Ins. Co., 374 N.E. 2d 127 (N.Y. App., 1978), a restaurant's liability to a patron for adulterated food was excluded on the basis that it was liability for its goods or product which were unfit.

Some courts have held that as the structure or item built by the contractor is the end result of an activity, the exclusion does not apply. A case that is representative of this position is Kisell v. Aetna Casualty and Surety Co.,[656] The insured general contractor, engaged to build a school, performed the carpentry work and sub-contracted the balance of the project. The insured was found liable when defects in the building appeared. The court held that the insured did not manufacture, sell, handle, or distribute any products. As its business was contracting, it performed services. The building should not be considered the insured's product within the meaning of the definition of "Named Insured's products", read with exclusion (i). Additionally, in Kammeyer et al v. Concordia Telephone Co. et al,[657] the court stated that as "understood in common parlance", the goods or products of the insured are those "...created or manufactured and placed in the ordinary channels of commerce, or intended to be so placed;" that "...any effort to define "product" as the end result of any activity...[such as contracting work]...will be rejected."[658]

Representative of the opposing position is J.G.A. Construction Corp. v. The Charter Oak Fire Insurance Co. et al,[659] the insured general contractor was sued with respect to damage on two separate building projects on which it held the general contracts.

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[656] 380 S.W. 2d 497 (Mo. App., 1964). This decision was followed by the Missouri Supreme Court in Rafiner Elevtor Works Inc. v. Michigan Mut. Liability Co., 392 S.W. 2d 240 (Mo., 1965).

[657] 446 S.W. 2d 486 (Mo. App., 1969).

[658] Ibid, at 489. See also, New Amsterdam Cas. Co. v. Addison, 169 So. 2d 877 (Fla. App., 1964); contra, Swillie v. General Motors Corp., 133 So. 2d 813, 823 (La. App., 1961), and Todd Shipyards Corp. v. Turbine Service Inc., 674 F. 2d 401 (5th Cir., 1982), applying La., law.

[659] 414 N.Y.S. 2d 385 (App., 1979).

With respect to one project, the claim centred about damages caused by a leaky roof. With respect to another, the claim alleged that the bulkheads of a swimming pool were "unsafe", "unsightly", and "unsatisfactory". The issue was whether the insured's liability was excluded by the equivalent of exclusion (i), and thus whether the buildings constituted the general contractor's products. The court looked to dictionary definitions which indicated that "product" means something produced by physical labour or intellectual effort. These definitions would appear to dispose of the issue. However, the court was mindful that these words must be interpreted the way in which they would be understood by the average person. Most people would say that a building built by a contractor is not its product but the result of a service. However, to give these words that interpretation would result in the policy operating as a performance bond which is not what the average person would expect from a liability policy. Accordingly, the court applied the dictionary definitions of the words and held that the damage is excluded.

The exclusion should not be narrowed to the point that it is only applicable to the product of the work actually performed by the general contractor. Otherwise, the policy becomes a performance bond for the work of the sub-contractors. Canadian courts have yet to consider this issue. The position taken by the court in J.G.A. Construction[660] is true to the policy's insuring intent, and should be followed. This issue could be easily resolved by revising the definition of Named Insured's products to include services.

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[660] Ibid.

(b) "Handled or Distributed"

In view of the wide range of meaning that can be ascribed to them, "handled or distributed" are the most indefinite terms used in this definition. "Handled" means "to touch"; but surely this meaning is tempered by the other words in the definition as it is part of an exclusionary clause. In Smedley Co. v. Employers Mutual Liability Insurance Co.,[661] the court agreed that "handle" means "to feel with the hand" but it also means to "to deal" or "trade in". The insurers obviously intended that "handle" bear the latter interpretation as it is linked to the words "manufactured, sold...or distributed."

This narrow, or restricted interpretation has won general acceptance.[662] Accordingly, the insured ship repairers who repaired a turbine in the third party's ship did not "handle" the turbine;[663] the insured heating company that installed a furnace manufactured by another in the third party's house, did not "handle" the furnace;[664] the insured warehouseman who, at the request of the bailor, delivered over 25 bags of "Flufftex" instead of "Frodex", a sugar substitute, did not "handle" the products involved therein in the sense that he dealt or traded in them.[665]

Assume the insured intends to sell or distribute a product, but through an accident for which it is responsible, another product is substituted, resulting in property damage. The insured's liability for that damage is not excluded because he did not intend to "handle or distribute" that product. Accordingly, in Philadelphia Fire & Marine Ins. Co. v. Grandview,[666] the insured municipality unknowingly allowed methane gas to be introduced into its water pipes so that an explosion occurred after the gas had filled a house. At issue was whether the damage which resulted in the liability of the insured city, was caused by a product which the city handled, or distributed. It was held that the municipality was handling and distributing water, not gas. "Handle or distribute" implies a conscious control and intent to parcel out or distribute. That was not the case here.

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[661] 123 A. 2d 755 (Conn., 1956).

[662] See Paxton-Mitchell v. Royal Indemnity Co., 567 P. 2d 581, at 587 (Or., 1977); Couch, Cyclopedia of Insurance Law, sect. 44A:56 (2nd ed., 1981); Todd Shipyards Corp. v. Turbine Service Inc., supra, n. 658; Friestad v. Travelers Indemnity Co., 393 A. 2d 1212 (Pa., 1978).

[663] Todd Shipyards Corp. v. Turbine Service Inc., supra, n. 658.

[664] Friestad et al v. The Travelers Indemnity Co., supra, n. 662.

[665] Smedley v. Employers Mutual Liability Ins. Co., 123 A. 2d 755 (Conn., 1956).

It follows that "handled or distributed" means to "trade in" or "deal" and implies a conscious decision to place a finished product into the channels of commerce.[667]

(c) "Manufactured"

As noted in the introduction to this Part, one of the purposes of this exclusion is to withdraw from coverage those risks covered under other types of policies. One of the risks that a manufacturer faces is a products liability risk--liability arising because of injury or damage caused by his faulty product. This is covered under products liability policies.[668]

Liberty Mutual Insurance Co. v. Hercules Powder Co.[669] considered the meaning of "manufactured". In that case, equipment adapted for the insured's use, which caused injury to the third party, was held to be equipment owned by the insured, and not

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[666] 255 P. 2d 540 (Wash., 1953).

[667] Swift & Co. v. London & Edinburgh Ins. Co., 264 N.E. 2d 389, at 395 (Ill. App., 1970).

[668] Appleman, Insurance Law & Practice, Vol. 7A, sect. 4508.

[669] 224 F. 2d 293 (3rd Cir., 1955).

"manufactured". The equipment in question was not destined for distribution in the channels of commerce, and hence, the liability the insured incurred with respect to it fell within coverage.

It follows that "manufactured", as used in the definition of "Named Insured's products", refers to goods or products manufactured by the insured that have been sent out into the channels of trade or commerce for use by others. It does not refer to products in the process of being completed or equipment adapted by the insured for use in its operations.

(d) "Sold"

"Sold" simply refers to those goods or products of the insured, that have been acquired by third parties pursuant to agreements that fall within the definition of "contracts of sale", as contained in provincial Sale of Goods legislation.[670]

(e) "Container"

At first blush, it does not appear difficult to determine what constitutes the "container" of the insured's good or product; however, this is not always the case. In Lewis & Co. v. Liberty Mutual Insurance Co.,[671] the insured manufactured textile machinery. The machinery was crated in wooden boxes for sale and distribution. Attached to the boxes were wires or cable slings designed by it to lift the boxes. These cables broke when the boxes were being loaded onto a ship at the docks. At issue was whether the cables were the "container" or part of the "container". The court accepted that the slings were designed to facilitate lifting the boxes of machinery and that they were part of the container.

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[670] Liberty Mutual Ins. Co. v. Gwin, 370 F. 2d 297 (5th Cir., 1976), applying Ala. law.

[671] 193 S.E. 2d 856 (Ga. App., 1972).

A "container" is any object which is designed or deliberately chosen by the insured to facilitate physical handling of its goods or products. The term includes all parts of the container so that if the container was a bucket, the handle of the bucket would be within the scope of the term. Any liability incurred by the insured for the defective condition of any part of the container, or the container itself, is withdrawn from coverage.

(f) "Any Property Rented to or Located for Use of Others but not Sold"

Excepted from the definition of named insured's products, and hence from exclusion (i) is "any property...rented to or located for use of others but not sold". In Insurance Co. of North America v. Electronic Purifiction Co.,[672] the court stated that in view of this exception to the definition, the policy covers the insured's liability for damage to property that it rents:

> The exception of an item from an exclusion leaves it under the general coverage, unless it is elsewhere excluded. Among the myriad provisions of the policy we find none specifically related to rented products. We find that as rented products are excepted...they come within the general

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[672] 433 P. 2d 174 (Calif., 1967).

coverage.[673]

Any equipment that the insured truly rents to others, is exempt from the definition of "named insured's products". If the rental payments are in fact disguised instalment payments, the transaction is a conditional sale as defined in provincial Sale of Goods legislation. In that case, the subject of the agreement would fall within the definition of Named Insured's products as a good or product sold by the insured.[674]

10.1 APPLICATION OF THE "PRODUCT ITSELF" EXCLUSION

The salient characteristic of this exclusion is that it excludes the insured's liability for its damaged products,[675] but not its liability for damage and injury to others caused by such products. If the insured's defective product causes damage to property other than the "named insured's products", exclusion (i) does not apply.[676]

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[673] Ibid, at p. 178.

[674] See Aetna Ins. Co. v. Loxahatchee Marina Inc., 236 So. 2d 12 (Fla. App., 1970); Mount Vernon Fire Ins. v. Pied Piper Kiddie Rides Inc., 445 A. 2d 949 (Del., 1982).

[675] Safeco Insurance v. Munroe, 527 P. 2d 64 (Mont., 1974), and Carwald Concrete and Gravel Co. Limited v. General Security Ins. Co. et al, [1986] I.L.R. 7951 (Alta. C.A.), at p. 7955.

[676] Sturges Manufacturing Co. v. Utica Mutual Ins. Co., 332 N.E. 2d 319 (N.Y. App., 1975). Not every complaint linked to the failure of the insured's product is excluded by this exclusion. In Ocean Construction Supplies Ltd. v. Continental Insurance Co.,[1978] 5 W.W.R. 681, [1978] I.L.R. 1289 (para. 1-1035) (B.C. S.C. T.D.). the insured undertook to improve the buoyancy of the third party's oceanarium; a vessel of steel and concrete, which was afloat, but anchored to the bottom, containing tanks of sea water, displaying sea life. The insured removed some of the sea water in the bottom of the tanks, and substituted a certain zonolite concrete aggregate which it manufactured. The insured warranted that its product was lighter than sea water, and would improve the buoyancy of the vessel. After the product was installed, it was discovered that it was heavier than sea water, reducing the vessel's buoyancy. The third party obtained judgment against the insured for the loss of profits sustained while the vessel was being repaired, the cost of additional insurance required until the vessel was ready for public viewing, the cost of temporary styrofoam placed under the vessel to keep it afloat while it was repaired, and the cost of the remedial work itself.

Rae, J., of the British Columbia Supreme Court, held that the insured's liability to the third party was covered under a CGL Policy. The insured's product was not defective. The product simply did not perform as warranted. As the insured's product was not damaged, exclusion (i) did not withdraw the insured's liability from coverage.If this claim was made under the I.B.C. CGL Policy, it would not be

In Pittsburgh Bridge & Iron Works v. Liberty Mutual Insurance Co.,[677] the United States Court of Appeals, third circuit, divided the cases dealing with this exclusion into two broad categories:

> (1) Where X supplies a part to Y who constructs an entity from X's part and from other parts and X's part proves defective causing damage to the entity.
>
> (2) Where X himself constructs an entity from his own parts or others' parts and
>
> > (a) a part of the entity is defective and causes damage to someone or something other than the entity, or
> >
> > (b) a part of the entity is defective and causes damage to the entity itself.
>
> In [situations] (1) and 2(a) it is clear and the cases are uniform, that the...exclusion is inapplicable and that there is coverage and the insurer must defend any suit brought by the injured party against X.[678]

The cases are replete with examples of situation (1). In Hauerstein v. St. Paul-Mercury Indemnity Co.,[679] the insured distributed a new type of plaster. The third parties applied the plaster to the walls and ceilings of their buildings. The insured's plaster shrank and cracked. The third parties filed claims against the insured for the value of the plaster, the cost of removing the insured's plaster, and replastering their walls and ceilings. The insurer stated that the claims were not covered and declined to defend. The insured argued that the claim was covered under the policy as the product had become part of the realty to which it had been applied. The court rejected this argument, holding that the "product itself" exclusion applied to a product handled by the insured even if it changed

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excluded by exclusion (k), the "business risk" exclusion, as there was no claim advanced for "loss of use of tangible property". For cases similar to Ocean Construction, see Cooling v. U.S. Fidelity & Guaranty Co., 296 So. 2d 294 (La. App., 1972); Diversified Products Co. v. Fidelity & Cas. Co. of N.Y., 355 F. 2d 846 (6th Cir., 1960).

[677] 444 F. 2d 1286 (App., 1971).

[678] Ibid. at 1288.

[679] 65 N.W. 2d 122 (Minn., 1954).

condition when put to its ordinary and everyday use. The insured's liability for the reduced value of the third parties' buildings caused by the defective plaster was covered.

Similar to Hauerstein[680] is the case of, Beacon Textiles Corp. v. Employers Mutual Liability Insurance Co. of Wisconsin,[681] where the third party purchased the insured's yarn, and made it into sweaters, which later changed colour. The colour change was due to an accident in the insured's manufacturing process. The court held that although the yarn ceased to have significance as a separate physical product, it remained yarn. The insured's liability for the reduced value of the sweaters was the pecuniary value of the damage caused to the third party's product, due to the insured's defective product. This liability was excluded by the product itself exclusion.

In the Hauerstein,[682] and Beacon Textiles[683] cases, the insured's product changed form but remained clearly identifiable. The courts were able to isolate the defective product from the damage to the third party's property, the insured's liability for the former being excluded by the product itself exclusion. These decisions are correct, for a contrary decision would place the CGL insurer in the position of a guarantor of the insured's products.

If the insured's defective product is incorporated with the third party's product to the extent that it is impossible to the distinguish the insured's product from the third party's; and if the insured's product proves defective, damaging the entity created by the two products, exclusion (i) would not apply. The damage to the third party's product is one and the same with the damage to the insured's product.

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[680] Ibid.

[681] 246 N.E. 2d 671 (Mass., 1969).

[682] Supra, n. 679.

[683] Ibid. at p. 681.

Situation 2(a) was discussed above and requires no further comment. After much debate, American courts have concluded that situation 2(b) as outlined in Pittsburgh Bridge & Iron Works[684] is correct.[685]

Does exclusion (i) exclude expenses that the third party incurs as a direct consequence of an accident caused by the insured's defective product? This issue was addressed by in Carpole's Inc. v. Insurance Co. of North America.[686] In that case, the insured manufactured, and sold, liquid fish fertilizer, packaged in five gallon containers. The containers were defective, and leaked. The third party sued the insured for loss of the fertilizer and the consequential damages for clean-up and removal. As the fertilizer was the insured's product, damages for its loss were excluded. The consequential losses of clean-up, and removal, could not be considered an item of damage separate and distinct from the product itself, and hence, fell within the exclusion.

Exclusion (i) withdraws from coverage those heads of damage that bear so direct an association with the defective product that they cannot be separated from the product itself. The insured's liability for the loss of use of its defective product is within the scope of the exclusion.[687]

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[684] Supra, n. 677

[685] See Southwest Forest Industries Inc. v. Pole Buildings Inc., 478 F. 2d 185 (9th Cir., 1973); Engine Service Inc. v. Reliance Ins. Co., 487 P. 2d 474 (Wyo., 1971); Haugan v. Home Indemnity Co. 197 N.W. 2d 18 (S.D., 1972); Darby v. Federal Assurance, 281 So. 2d 561 (Fla. App., 1973); Biebel Bros. Inc. v. United States Fidelity & Guarantee Co., 522 F. 2d 1207 (8th Cir., 1975), Adams Tree Service Inc. v. The Hawaiian Ins. & Guaranty Co. et al, 573 P. 2d 76 (Ariz. App., 1977); Timberline Equipment Co. Inc. v. St. Paul F. & M. Ins. Co., 576 P. 2d 1244 (Ore., 1978); contra, Cotton States Mut. Ins. Co. v. Norell Heating et al, 370 So. 2d 270 (Ala., 1979); Cotton States Ins. Co. v. Diamond Housing etc, 430 F. Supp. 503 (N.D. Ala., 1977). In the latter case it was held that this analysis should not be applied in cases where the insured is a retailer, selling the manufactured goods of others to the public, as a contrary result would exclude the very type of liability coverage required by the insured, and for which a premium was paid. This reasoning might persuade the Canadian courts to follow suit. See: Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Ins. Co., [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 49, [1980] I.L.R. 593 (para. 1-1176); Tiko Electric v. The Canadian Surety Co., [1973] I.L.R. 750 (para. 1-573) (Ont. H.C.); Indemnity Ins. Co. v. Excel Cleaning, [1954] S.C.R. 169, [1954] 2 D.L.R. 121 (S.C.C.). However, this flies in the face of the unambiguous policy wording and would result in judicial re-writing of the policy.

[686] 544 F. Supp. 6 (D. Minn., 1982).

To conclude, if the insured constructs an entity from his own parts or others' parts and a part of the entity is defective, causing damage to the entity itself, the insured's liability for that damage, plus its liability for damages directly associated with the product, such as its loss of use, is excluded by exclusion (i). Exclusion (i) will not apply where:

(1) The insured supplies a part to the third party, who constructs an entity from the insured's part and from other parts, so that all parts are indistinguishable parts of a whole and the insured's part proves defective, causing damage to the entity.

(2) The insured constructs an entity from his own parts and or others' parts, and a part of the entity is defective, causing damage to someone or something other than the entity.

10.3 CONCLUSION

The "product itself" exclusion, exclusion (i), read with the "work performed exclusion", exclusion (j), excludes the insured's liability to repair or replace its defective goods, products, and work products. These exclusions prevent the CGL Policy from being interpreted as a *de facto* performance bond or a guarantee of the quality of the insured's products. Accordingly, both exclusions make exclusive reference to property damage to the named insured's products or work product. The CGL Policy is structured to cover the insured's liability for property damage to property other than the insured's product, or work product, and bodily injury to persons other than those who are named or unamed insureds, or employees of a person insured.

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[687] Employers Cas. Co. v. Brown McKee Inc., 430 S.W. 2d 21 (Tex. App., 1968); Biebel Bros. Inc. v. United States F. & G. Co., 522 F. 2d 1207 (8th Cir., 1975), applying Miss. law.

Turning to the "product itself" exclusion, if any part of the insured's product is defective and if that defect causes damage to other parts of the insured's product, the insured's liability for damage to all parts of the product is excluded. The exclusion refers to "property damage to the Named Insured's product arising out of such products *or any part of such products*.

"Named insured's products" is defined in the definition section of the policy shell. The definition applies only to "goods or products" "...manufactured, sold, handled or distributed by the Named Insured..." The named insured's goods or products are all the products in which the insured actually trades or deals even though the insured's ordinary business does not relate to the manufacturing, selling, handling or distributing of merchandise. A controversy has arisen as to whether a general contractor's product is the building it contracts to build, notwithstanding that the actual construction is sub-contracted to others. The better opinion is that should the insured incur contractual liability for the negligent performance of the building contract, the building should be considered the insured's product. A contrary result would transform the policy into a performance bond--a result that would defeat the insuring intent of the CGL Policy.

The Named Insured's goods or products will only be considered the

"Named Insured's products" if they are "manufactured, sold, handled or distributed, by the Named Insured or others trading in its name. "Manufactured" refers to sending a completed good or product into the channels of commerce for use by others. A good or product is sold when it is acquired by third parties through agreements which fall within the definition of "contracts of sale" as contained in provincial Sale of Goods legislation. "Handled or distributed" refers to an intentional distribution of the product in which the insured trades or deals into the stream of commerce.

The definition of "named insured's products" expressly includes the product's container. A "container" is any object which the insured designed, or deliberately chose, to facilitate physical handling of the Named Insured's products.

Excepted from the definition of "named insured's products", (hence placed back into coverage, subject to any other applicable exclusion), are vending machines and other property "rented to or located for use of others but not sold". If the rental payments are in fact instalment payments, the transaction will be a conditional sale falling within the definition of a "contract of sale" found in provincial Sale of Goods legislation. In that event, the goods will be sold goods, and outside the scope of the exception, into the exclusion.

In summary, exclusion (i), read with the definition of "named insured's products", is principally applicable to manufacturers, distributors, and retailers who send their goods or products into the stream of commerce. It operates to exclude their liability to others arising out of defects and deficiencies in their products. It is not intended to exclude their liability for property damage to property (other than their product) nor bodily injury to persons (other than those insured under the policy, or employees of an insured person) caused by the insured's products.

Chapter 11

Exclusion (j): The "Work Performed" Exclusion

Exclusion (j), the "work performed" exclusion, states:

> This insurance does not apply to:
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> . . .
>
> (j) **property damage** to work performed by or on behalf of the **Named Insured** arising out of the work or any portion thereof, or out of the materials, parts or equipment furnished in connection therewith;

"Property damage", and "Named Insured", are defined in the definition section of the policy shell and were discussed in Chapters 5 and 3 respectively.

The insuring intent behind this exclusion is identical to that of exclusion (i),[688] the "product itself" exclusion. It is principally designed to exclude the insured's liability to repair or replace its defective or deficient work product. Without this exclusion, the CGL Policy would be transformed into a performance bond--a guarantee of the insured's contractual performance.[689]

This exclusion has been consistently applied to the cost of repairing or replacing the insured's work product.[690] It does not apply to the insured's liability for property damage, external to that work product.[691] Similarly, coverage for the insured's liability for bodily injury to persons, other than persons insured, or their employees, arising from his work product, is not excluded. Accordingly, if the insured built a warehouse with an inadequately supported roof which collapses, damaging goods stored in the warehouse and injuring employees working on the warehouse floor, coverage for the insured's liability to the consignors, and bailees of the goods, and to the injured persons, would not be affected by this exclusion. However, the insured's liability to repair or replace the roof would be excluded.

The first section of this Chapter discusses the meaning of "work". The second section looks at the meaning of the phrase "by or on behalf" of the insured. This phrase is found in other parts of the policy, but it is thought best to deal with it here. The third section discusses the impact that the Supreme Court of Canada's decision in

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[688] See Chapter 10 "The Work Performed Exclusion".

[689] Weedo v. Stone-E-Brick Inc., 405 A. 2d 788 (N.J., 1979); Vernon Williams & Son Construction Inc. v. The Continental Ins. Co., 591 S.W. 2d 760; Henderson, Roger C. *"Insurance Protection for Products Liability and Completed Operations--What Every Lawyer Should Know,"* (1971), 50 Neb. L.R. 415, at pp. 441-442.

[690] Todd Shipyards Corp. v. Turbine Service Inc., 674 F. 2d 401 (C.A., 5th Cir., 1982), at p. 420, aff'd in part 674 F. 2d 401, rehearing denied, 680 F. 2d 1389; Yobill Homes Inc. v. Hartford Accident & Indemnity Co., 179 So. 2d 496 (La. App., 1965), writ refused, 181 So. 2d 398; Engine Service Inc. v. Reliance Ins. Co., 487 P. 2d 474 (Wyo., 1971).

[691] St. Paul Fire & Marine Ins. v. Sears Roebuck & Co., 603 F. 2d 780 (C.A., 9th Cir., 1979).

Foundation of Canada Engineering Corp. Ltd. v. The Canadian Indemnity Co. et al.[692] has had on this exclusion. That court referred to this exclusion in *obiter*, but the comments may have rather far-reaching implications.

11.1 THE MEANING OF "WORK"

"Work" has been defined in accordance with the policy's insuring intent. If a contractor builds a building contrary to the specifications and is sued for its failure to follow specifications, the building is its 'work" and the exclusion applies.[693] "Property damage to work performed" means damage to the building, and "arising out of the work" means resulting from performance of the work. Property damage "arises out of the work" where the insured fails to follow specifications. If this were not the case, the policy would insure the contractor's failure to perform his contract.

The word "work" appears twice in this exclusion. It was argued in Southwest Forest Industries Inc. v. Pole Building Inc.[694] that the second mention of "work" refers to an activity. Consequently, the exclusion applies to damage to a building under construction, while it is being constructed, and not after its completion. This was rejected by the court:

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[692] [1978] 1 S.C.R. 84, 74 D.L.R. (3d) 266, [1977] 2 W.W.R. 75, [1977] I.L.R. 440 (para. 1-832), 15 N.R. 164 (S.C.C.); aff'g [1974] 3 W.W.R. 23, 44 D.L.R. (3d) 298, 13 N.R. 282, [1974] I.L.R. 903 (para. 1-609) (Man. C.A.); allowing the appeal of Employers Ins. Co., and dismissing that of Canadian Indemnity Co., against Fenco, from an unreported decision of the Manitoba Court of Queen's Bench, the contents of which are summarized at 74 D.L.R. (3d) 267.

[693] Eulich v. Home Indemnity Co., 503 S.W. 2d 846 (Tex. App., 1974).

[694] 478 F. 2d 185 (C.A. 9th Cr., 1973).

> When used in this context, the word "work" should be read as a noun referring back to, and having the same meaning as the phrase, "work performed". The section should thus operate to withdraw coverage for damage to the insured's work product, resulting from an inherent defect, even though construction is complete and the contractor has relinquished control. This interpretation is consistent with the construction accorded similar exclusion clauses in numerous other cases.[695]

Exclusion (j) excludes property damage (as defined) to the building or object that the insured erected, or altered, or otherwise serviced, which arises out of substandard, defective performance of the insured's construction, repair or service operations, even after the project is completed.

Another aspect of the meaning of "work" is that the exclusion specifies that property damage which arises from the work "or any portion thereof" will be excluded. If a general contractor contracts with the project owner to build a building and sub-contracts the physical labour to build it, is the general contractor's "work" the building?

This was considered in *Indiana Insurance Company* v. *Dezutti.*[696] In that case, the insured was a general contractor engaged in the construction and remodeling of residential structures, with the assistance of subcontractors. The insured built a home which he sold to the third parties. Seven years later, serious cracking occurred in the mortar and bricks. The third parties sued the insured on the basis of a breach of warranty of fitness. It was alleged that the damage was caused by the settling of the building due to improper construction of the footings in that they were not laid in hardpan soil. The insurers denied coverage and declined to defend. The insured brought this action to determine its rights under the policy.

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[695] *Ibid.* at p. 187. The cases referred to are *Haugan* v. *Home Indemnity Co.*, 197 N.W. 2d 18; *Hartford Accident & Indemnity Co.* v. *Olsen Bros. Inc.*, 188 N.W. 2d 699 (Neb., 1971); *Yobill Homes Inc.* v. *Hartford Accident & Indemnity Co.*, 179 So. 2d 496 (La. App., 1965), writ refused 181 So. 2d 398; *Heyward* v. *American Cas. Co.*, 129 F. Supp 4 (D.C. S.C. 1955); *Liberty Building Co.* v. *Royal Indemnity Co.*, 2 Cal Rptr. 329.

[696] 408 N.E. 2d 1275 (Ind., 1980).

The issue was whether the house was the insured's "work", which determined whether this exclusion applies. The court stated that in the case of a general contractor, his product or work must be the entire project covered by his contract. This means that a sub-contractor's "work" is narrower than a general contractor's, and the "work performed" exclusion in the sub-contractor's CGL policy would have narrower scope. However, if the work performed by the sub-contractor caused damage to other parts of the project described in the general contract, that liability is covered. That is not the case for the general contractor. In this case, the insured's liability for the footings was excluded as it was damage to part of the project described in the contract. This reasoning is consistent with the policy's insuring intent. A contrary result would transform the policy into a *de facto* guarantee of the insured's work.[697]

The British Columbia Courts considered the meaning of "work" in a similar exclusion on two occasions. In Prince George White Truck Sales Ltd. v. Canadian Indemnity Co. Ltd.,[698] the trial division held that defective repair work on a truck engine was not "work" within the meaning of an exclusion which read..."damage to or destruction of or loss of use of;...work done by or for the insured where the cause of the accident is defect in such work."[699] "Work", an activity, was not the same as "a work", a noun. As the insured incurred its liability through an activity, the exclusion did not apply. The Court of Appeal cast doubt on whether this decision was correct in Harbour Machine Ltd. v.

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[697] I.G.A. Construction Corp. v. The Charter Oak Fire Ins. Co., 414 N.Y.S. 2d 385 (App., 1979).

[698] [1973] 6 W.W.R. 365, [1973] I.L.R. 982 (para. 1-344) (B.C. S.C. T.D.).

[699] Ibid, at p. 369 (W.W.R.).

Guardian Insurance Company of Canada.[700] The court held that the insured's liability for improper selection of materials and poor workmanship fell within an exclusion for "damage to or destruction of any property...as a result of any work performed thereon...". It declined to follow Prince George White Truck,[701] and held that "work" includes an activity, such as repair operations, and the result of those operations, the thing repaired. Prince George White Truck[702] must be considered seriously qualified, if not directly overruled.

To conclude this part, "work", occurs twice in exclusion (j), and has the same meaning throughout. It refers to what the insured did, its work, as well as the product of that activity.

11.2 THE MEANING OF "BY OR ON BEHALF OF THE NAMED INSURED"

In C.O. Falter Inc. v. Crum & Forster Ins. Co.,[703] the court construed the phrase "work performed *by* the Named Insured", as it appeared in a rough equivalent of exclusion (j), to refer only to the insured's employees. The phrase "work performed *by or on behalf* of the Named Insured" is wider that "work performed *by* the Named Insured". Occasionally insureds agree with others to be liable for the negligence of independent contractors hired by them under contracts of service. This liability is ordinarily excluded by the contractual liability exclusion, exclusion (a). If exclusion (a) is removed by an endorsement to the policy, does exclusion (j) apply to the insured's liability for the activities of its independent contractors? Does *"by or on behalf "* include the named insured's liability for the work of its independent contractors?

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[700] (1985), 60 B.C.L.R. 360 (C.A.).
[701] Supra, n. 698.
[702] Ibid.
[703] 361 N.Y.S. 2d 968 (Sup., 1974).

This was the issue in Insurance Company of North America v. Bosworth Construction Co.[704] The meaning of "by or on behalf of the Named Insured" as it appeared in a products hazard exclusion was considered. That exclusion read as follows:

> (2) operations, including any act or omission in connection with operations performed by or on behalf of the Named Insured on the premises or elsewhere and whether or not goods or products were involved in such operations, if the accident occurs after such operations have been completed or abandoned and occurs away from premises owned, rented or controlled by or on behalf of the Named Insured...[705]

The insurer argued that the phrase "by or on behalf of the Named Insured" renders the exclusion applicable to the Named Insured's employees but exempts the named insured's independent contractors. If the court adopted the insurer's argument, the insuring intent of the CGL Policy would be subverted. The policy would be transformed into a performance bond for the named insured's independent contractors. The insurer recognized that this was the logical result of its argument but justified it on the grounds that broader coverage was necessary for the acts of independent contractors. The insured cannot work as closely with independent contractors as it can with its own employees. The court rejected this argument, as should Canadian courts when faced with this issue. There is nothing in the policy to indicate intent to provide such broad coverage for independent contractors.

To conclude this part, the phrase "by or on behalf of the Named Insured" withdraws from coverage liabilities incurred by the named insured's employees and independent contractors that arise out of the work, or out of a portion of the work, or out of materials, parts or equipment furnished in connection with that work.

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[704] 469 F. 2d 1266 (C.A., 5th Cir., 1972).

[705] Ibid. at p. 1269.

11.3 EXAMPLES OF THE APPLICATION OF EXCLUSION (J)

In Adams Tree Service v. The Hawaiian Insurance and Guaranty Co. Ltd.,[706] the insured was engaged in the business of selling new vehicles and repairing, reconditioning, and selling old vehicles. The insured agreed to sell a used tractor truck to the third party. At the same time, the insured agreed to convert the tractor into a dump truck by cutting the chassis, placing a 24 inch extension into the basic frame members, and installing a dump body. The insured failed to recognize that the chassis was not strong enough to accommodate modification. The truck's chassis collapsed. The third party sued the insured for loss of use of the truck as represented by the cost of renting replacement vehicles, loss of business, and impaired credit standing. The insurer denied coverage on the basis of the "work performed" exclusion. Judgment was entered against the insured, who brought this action against the insurer to determine its rights under the policy.

The court acknowledged that as the injury to or destruction of tangible property was to the work performed, cutting and extending the chassis, and installing the dump body, the insured's liability to the third party was withdrawn from coverage by the

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[706] 573 P. 2d 7′ (Ariz. App., 1977).

"work performed" exclusion.[707] However, the court preferred to rest its decision on the "product itself" exclusion. The chassis was part of the dump truck manufactured, sold, handled or distributed by the insured.

This case demonstrates the close relationship between exclusions (i) and (j). As the product sold to the third party was defective due to the insured's substandard modifications, this was a better case for the application of the "work performed" exclusion.

In Biebel Bros. Inc. v. U.S. Fire & Guaranty Co.,[708] the insured contracted with the third party to apply roofing materials to a flat metal roof deck, which the third party constructed. The insured's task involved six steps. Just prior to step six, the insured realized that the material applied in step four, was entirely unsuitable. The insured was required to strip the roof of all material applied in the previous five steps, and put down new materials, restoring the roof to the condition it was in when the mistake was discovered. There was no adverse effect on the building after the error had been corrected. The court held that the insured's liability to the third party for the delay in the performance of its contract, was excluded by the "work performed" exclusion. The delay arose because of the insured's substandard performance of his contract. The defective materials were supplied by the insured. The court concluded that if the "work performed" exclusion did not apply to the facts before it, it is completely meaningless. Although this exclusion clearly applies, one wonders why a discussion of exclusions was necessary. Was there property damage as defined caused by accident?

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[707] As property damage was defined as "injury to or destruction of tangible property." intangible damage (loss of business and credit standing) consequent to the damage to tangible property (the truck) was covered by the policy. As the 1978 I.B.C. CGL model policy requires physical injury to or destruction of tangible property, the result would not be the same.

[708] 522 F. 2d 1207 (C.A., 8th Cir., 1975).

In Oliver B. Cannon & Son Inc. v. Fidelity & Casualty Co. of New York,[709] the insured sub-contractor was engaged by the general contractor to prepare and paint the linings of certain chemical storage tanks. The insured was to prepare the surface of the tanks by removing the rust and foreign materials, and then apply polyester resin linings. The court held that the insured was guilty of a "multitude of sins," both in the preparation of the surfaces and in the application of the lining materials. As a result of this poor workmanship, the tank linings began to deteriorate almost immediately. The insured was held liable to the owners of the tanks and to the general contractor for the former's lost profits resulting from the loss of use of the tanks and for the latter's expenses with respect to the repair operations. As to whether the insurer had an obligation to indemnify the insured, the court held that damages for repairing and replacing the defective tank liners were damages to the "the Named Insured's products" and "work performed by...the insured" excluded by the "product itself" and "work performed" exclusions. However, any damages to the tanks themselves, or damages to other parts of the plant or its operation, would not fall within the exclusions. This decision is correct. A contrary holding would have transformed the policy into a guarantee of the insured's contractual obligations.

Finally, in Sentry Insurance Co. v. S.& L. Home Heating Co.,[710] the owner of an industrial plant sued the general contractor for damages resulting from a deficient ventilation system. The general contractor third partied the insured sub-contractor, who performed the ventilation work. This action, brought by the sub-contractor's insurers, was for a declaration as to its defense obligations. The plant was expected to produce abrasive dust, and vaporous solvents and oils. The specifications called for a heating, ventilation, and air conditioning system adequate to cope with these substances. After the plant began operations, deficiencies in the system became apparent. Noxious vapours in the air impaired the performance of the employees and caused corrosion in some components of the system, notably the heat exchangers and air conditioning compressors. The damages claimed were for:

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[709] 484 F. Supp. 1375 (D.C. 1980, applying Penn. law).
[710] 414 N.E. 2d 1218 (Ill. App., 1980).

(1) deterioration and corrosion of the system's heat exchangers and air conditioning compressors;

(2) irritation to the eyes and nostrils of the plant's employees;

(3) reduced productivity by the plant's employees.

With respect to item (2), no one contended that this irritation did not constitute "bodily injury". With respect to item (3), the policy defined property damage as "injury to or destruction of tangible property". The claim for reduced productivity was in fact a claim for economic loss. This did not constitute injury to tangible property and was not covered. The sole item of property damage that could have been compensable damage as defined is item (1). However, the heat exchangers, and air conditioning compressors, were part of the system supplied by the insured and fell within the definition of "Named Insured's products". Damage to these products was excluded by the "product itself" exclusion. The "work performed" exclusion excludes deficiencies in the insured's work causing the property damage complained of. The court held that the insurer had no obligation to defend the claim. This is a curious result as the claim for third party claim for bodily injury would not be affected by the "product itself" or "work performed" exclusions and should have triggered the insurer's defence obligations.

11.4 THE IMPACT OF THE SUPREME COURT OF CANADA'S DECISION IN FOUNDATION OF CAN. ERG. CORP. v. THE CANADIAN INDEMNITY CO. LTD.

Mr. Justice de Grandpre made reference to the "work performed" exclusion while giving reasons for judgment in Foundation of Canada Erg. Corp. v. Canadian Indemnity Co. Ltd.[711] In that case, the insured breached its contract with the third party by failing to adequately supervise the construction of a building. This breach of contract constituted a breach of the professional responsibility that the insured owed to the third party. The insured held two CGL Policies. One issued by Canadian Indemnity Co. contained an exclusion for liability arising through breach of the insured's professional obligations. The other policy, issued by Employers' Insurance Co., did not contain such an exclusion. Canadian Indemnity Co. Ltd. had no obligation to extend coverage to the insured. The issue was whether the Employers' Insurance Co.'s policy covered the insured's professional liability.

The Supreme Court of Canada affirmed the conclusion of the Manitoba Court of Appeal that the contractual liability exclusion withdrew the claim from coverage. In the following *obiter* comments, the court concluded that a CGL Policy does not cover the insured's professional liability:

> Without attempting to cast a mold to shape all future possibilities, it must be noted that historically a public liability policy is a contract insuring the general responsibility in tort of the insured to the world at large. It is sufficient here to recall that for many years policies of that type were limited to accidental events and clearly kept outside of the coverage of all claims resulting from contractual arrangements. Admittedly, this concept has been broadened over the years as appears from the insuring

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[711] Supra, n. 672.

> agreement in the case at bar which refers to occurrence as well as to accident and which refers also to liability assumed by contract as well as to liability imposed by law. The question is: Does the insurance protection under examination here extend to the consequences of professional negligence...? As already stated, the question, in my view, must be answered in the negative.[712]

In support of this conclusion, the court noted the practice of the industry to cover professional liability in a separate policy, the contractual liability exclusion, and the "work performed" exclusion. Both exclusions worked independently to exclude professional liability.

The clear message of these *obiter* comments is that a CGL Policy does not cover the insured's professional liability. Professionals wishing liability coverage for their practices must obtain professional liability policies.

In what circumstances does an insured incur professional liability? What constitutes the rendering of a professional service? This was one of the issues that was before the Alberta Courts in Tested Truss Systems Inc. v. The Canadian Indemnity Co. Ltd.[713] The Alberta Supreme Court Appellate Division affirmed with little discussion the decision of the Alberta District Court that the policy's defence agreements imposed an obligation on the CGL insurer to defend the insured. Additionally, the trial judge held that although the insured's liability arose from drawings of roof trusses that it drew up and supplied to the third party, the insured did not render a professional service:

> It is to be inferred from the agreed statement of facts and the arguments that the...[insured]... merely prepared and supplied design drawings for the roof of the building in question. It was apparently neither employed nor under a duty to supervise or be on the job. There was no evidence

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[712] Ibid. at p. 270-271 (74 D.L.R. (3d) 266).

[713] [1974] 2 W.W.R. 288, [1974] I.L.R. para. 1-605 (Alta. S.C. A.D.); aff'g [1973] 4 W.W.R. 542, [1973] I.L.R. 1-552 (Alta. D.C.).

> before me that it was either a professional architect or engineer.[714]

It follows that the insured renders a professional service to a third party, where it is employed in a professional capacity. The insured is employed in its professional capacity, if the insured holds itself out as having a particular expertise, and the third party hires and relies on the insured to use its expertise to perform a particular task. If the insured negligently performs that task, it will incur professional liability to the third party.

11.5 CONCLUSION

The "work performed" exclusion, exclusion (j) is placed in the policy to exclude the insured's liability to other's when repairs performed by the insured, or a building built by the insured, or other work performed by the insured is deficient. If this liability was not excluded the CGL policy would act as a guarantee of the insured's workmanship. The CGL is not a performance bond. It is intended to protect the insured when its deficient or substandard work or product causes injury to others, or damages property other than the insured's work or product.

Building contractors can obtain protection for their deficient work through a builder's all risk policy, also known as a course of construction policy. This is a property policy as opposed to a liability policy. It only applies during construction. Once the contractor moves off the site, relinquishing possession of the project, it no longer has an insurable interest in the property and the policy does not apply. There is an exclusion in the policy for building deficiencies caused by improper workmanship. No insurance policy will insure damage to a building built by a general contractor caused by that contractor's improper workmanship. That is an uninsurable business risk.

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[714] Ibid, at p. ____ ([1974] 2 W.W.R.).

The word "work" occurs twice in the exclusion. It is to be given the same meaning throughout. It refers to what the insured did as well as the end result of the work. The exclusion extends not only to work done by the Named Insured, but also to work performed by the Named Insured's employees and independent contractors hired by the Named Insured. The insured is not, ordinarily, liable for the acts of its independent contractors. However, it may, by contract agree to hold others harmless from damage that they cause. If the insured has a contractual liability endorsement on its policy, rendering exclusion (a) inapplicable, the question is whether exclusion (j) would exclude this liability. It does. If it did not, the policy would act as a guarantee of the work of the insured's independent contractors. Note that under the standard form CGL policy the insured's independent contractors are not insured's persons. By stating that the exclusion applies to their work, the courts are not assuming that they are insureds. They are stating that the insured's liability for their work is also excluded.

In the Foundation of Canada[715] case, the Supreme Court of Canada indicated that the "work performed" exclusion, read with the "contractual liability" exclusion would exclude the insured's liability arising from the rendering of professional services. An insured renders "professional services" when it is employed by the third party in a professional capacity.[716]

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[715] Supra, n. 692.

[716] Tested Truss Systems Inc. v. The Canadian Indemnity Co. Ltd., supra, n. 713.

Chapter 12

Exclusion (k): The "Performance" Exclusion

Exclusion (k), the "performance" exclusion, reads as follows:

> This insurance does not apply to:
>
> . . .
>
> (k) to loss of use of tangible property which has not been physically injured or destroyed resulting from
>
> > (1) a delay in or lack of performance by or on behalf of the **Named Insured** of any contract or agreement, or
> >
> > (2) the failure of the **Named Insured's products** or work performed by or on behalf of the **Named Insured** to meet the level of performance, quality, fitness, or durability warranted or represented by the **Named Insured**;
> >
> > but this exclusion does not apply to loss of use of other tangible property resulting from the sudden and accidental physical injury to or destruction of the **Named Insured's products** or work performed by or on behalf of the **Named Insured** after such

> products or work have been put to use by any person or organization other than an **Insured**;

The "performance" exclusion has yet to be considered by the Canadian courts. As it is identical to exclusion (m) of the 1973 American standard form policy, American authorities can be used to interpret it.

This exclusion first appeared in the 1966 American standard form policy as follows:

> (k) to bodily injury or property damage resulting from the failure of the Named Insured's products or work completed by or for the Named Insured to perform the function or serve the purpose intended by the Named Insured, if such failure is due to a mistake or deficiency in any design, formula, plan, specifications, advertising material or printed instructions prepared or developed by any insured, but this exclusion does not apply to bodily injury or property damage resulting from the active malfunctioning of such products or work.

This exclusion, known as the "business risk" or "design" exclusion, was intended...

> ...to make clear that the insured's business operations as such would not be underwritten by any policy regularly available in the market place. The development or introduction of a new product and changes in or experimentation with a product are ordinary risks of doing business. They are risks which the insured alone is qualified to judge.[717]

The exclusion was intended to ensure that losses caused by management through the development of a product would be excluded. However, this exclusion was so difficult to understand that in 1975, the New York Court of Appeals ruled that due to its ambiguity, the entire exclusion was unenforceable:[718]

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[717] Reichenberger, Alfred E., *The General Liability Insurance Policies – Analysis of the 1973 Revisions*, in D.R.I. Monograph, General Liability Insurance, 1973 Revisions, at p. 5, 16 (Vol. 1974, No. 1, 1974).

> Efforts to make sense of this clause seems doomed to failure, since the language is self-contradictory. One wonders what, other than "active malfunctioning" could be "the failure of the...products...to perform the function or serve the purpose intended." Perhaps "active malfunctioning" is intended to suggest a distinction between defects that manifest themselves while the product is in use, as compared to latent defects discovered while the product is inactive...This however, is random speculation, since the clause does not make this distinction clear. Again, "active malfunctioning" seem descriptive of all that is excluded from coverage. If underwriters know what this so-called standard form clause means, the average insured probably does not, and this court most certainly does not.

There were three problems with the 1966 wording.[719] Firstly, what constitutes the planning stages of a business or operation? Many business' planning and production stages are inextricably intertwined. Secondly, when does a product "malfunction"? Many products liability cases have imposed liability when the product does what it is supposed to do, but does so by creating an unreasonable risk of harm to others. Does that constitute a "malfunction"? Thirdly, when does a product "actively" malfunction?

Assuming that these difficulties could be resolved, the insurers were left with a contradiction in that claims for bodily injury or property damage which occurred as a result of errors or omissions in the planning stage were excluded; but coverage was provided for the same damage and injury which occurred due to defects in the product once it was completed. The purpose of liability insurance is not to guarantee the performance of the insured's product; but it does not necessarily follow that *all* loss due to management mistake in designing the product should be excluded. The only aspect that should be excluded are "economic risks arising from the market place which subject the businessman to ruin for faulty planning or judgment."[720] This translates to a need for an exclusion for the insured's liability arising from "...physical damage caused by deficient work placed in the stream of commerce."[721]

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[718] Sturgis Manufacturing Co. v. Utica Mutual Ins. Co., 371 N.Y.S. 2d 444 (App. Div., 1975), at pp. 448-449.

[719] Henderson, Roger C., *Insurance Protection for Products Liability and Completed Operations--What Every Lawyer Should Know*, 50 Neb. L.R. 415, at 438 et seq.

These difficulties mandated revision, and in 1973, exclusion (m) of the American standard form policy (identical to exclusion (k) of the 1978 I.B.C. CGL model policy), replaced it. The most noticeable change is that the exclusion no longer applies to bodily injury, nor does it apply to physical damage to property. It applies solely to loss of use of property that is not damaged caused by (1) non-performance or delayed performance of a contract; or (2) unsatisfactory product or work. It also eliminates the distinction between planning or management errors, and employee errors.[722]

The remainder of this chapter reviews American judicial treatment of this exclusion since its revision in 1973.

12.1 LOSS OF USE OF UNDAMAGED PROPERTY DUE TO A DELAY IN OR LACK OF PERFORMANCE OF A CONTRACT

The "performance" exclusion only applies to *loss of use* of tangible property *which has not been physically injured or destroyed.*[723] Accordingly, the insured's liability to the third party for damages resulting from the corrosion of the third party's metal roof caused by a chemical reaction between the insured's insulation, and contact with the roofing, did not fall within the exclusion. The claim was for definite physical injury or destruction, not a mere loss of use of property.[724]

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[720] Ibid.

[721] Ibid.

[722] See Appleman, *Insurance Law and Practice*, (Berdal, ed.), Vol. 7A, para., 4508; see also *Couch on Insurance* 2d. (Rev. ed.), at para. 44:518.

There has been some discussion in the American courts as to whether the first clause of the "performance" exclusion applies to the insured's liability to third parties arising from its negligent non-performance of a contract.

In Cute'-Togs of New Orleans Inc. v. Louisiana Health Service & Indemnity Co.,[725] the third party, Cute'-Togs, entered into a contract with the insured, Blue Cross, whereby Blue Cross agreed to insure subscribing employees of of Cute'-Togs under a group policy. One of Cute'-Togs employees sent in an application to Blue Cross applying for medical insurance protection for himself and his family. The employee's wife was hospitalized. The employee found out that Blue Cross had not yet processed his application for group insurance coverage, and he was without coverage for his wife's medical care. The employee terminated his employment with Cute'-Togs because of the lack of coverage. Cute'-Togs sued Blue Cross alleging that its negligence in the processing of the application forced a skilled and valuable employee to leave, resulting in a loss of production. The insurer for Blue Cross refused to defend the lawsuit, and Blue Cross brought this action against the insurer to determine whether its potential liability to Cute'-Togs' was covered under its CGL Policy.

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[723] Wyoming Sawmills v. Transportation Ins. Co., 578 P. 2d 1253 (Or., 1978), where it was stressed that the exclusion only applies to the *loss of use* of tangible property.

[724] Champion v. Panel Era Manufacturing Co., 410 So. 2d 1230 (La., App., 1982). See also Todd Shipyards Corp. v. Turbine Service Inc., 467 F. Supp. 1257, affirmed in part, reversed in part, modified in part, 674 F. 2d 410, rehearing denied 680 F. 2d 1389; and Superior Steel Inc. v. Bituminous Cas. Corp., 415 So. 2d 354 (La. App., 1982), where the insured's defective product caused physical damage to the third party's property, for which damages were claimed. Such a claim was not caught by the "performance" exclusion.

[725] 376 So. 2d 999, writ granted 380 So. 2d 69, reversed 386 So. 2d 87 (La., 1980).

The Louisiana Court of Appeal held that there had been a loss of use of tangible property not physically damaged or destroyed, caused by an occurrence. Further,

> Since the insurer did not specifically exclude negligence as a contractual ground of non-defense,...[the insurer]...must defend Blue Cross. Since there was no unambiguous exclusion of coverage for the occurrences and property damage that resulted,...[the insurer]...must indemnify Blue Cross.[726]

The court came to the conclusion that "delay" and "lack of performance...of any contract or agreement" refers to intentional, deliberate delay and non-performance.

On appeal, the Louisiana Supreme Court reversed the appellate court, in a three to one decision. It held that the performance exclusion excluded coverage "for any damage occasioned by the breach of any contracts or agreements."[727] It carefully noted that:

> the duty owed to Cute'-Togs' is one which arose from the contract between them, and it follows that any harm or damage which Cute'-Togs' claims to have suffered resulted from the failure of Blue Cross to comply with its agreement thereunder.[728]

The Appellate Court ignored the source of the alleged damages that determines whether the first clause of the "performance" exclusion applies. As the claim flows from a failure to perform a contract, the exclusion applies, even though the failure to perform was due to the insured's negligence.

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[726] Ibid, at p. 1002 (376 So. 2d).

[727] Ibid, at p. 88 (386 So. 2d).

[728] Ibid.

This decision is at odds with Geurin Contractors Inc. v. Bituminous Casualty Corp.[729] In that case the insured negligently performed a road paving contract. As a result of that negligence the road was closed in front of the third party's store. The insured was held liable for the loss of use of the third party's store during the forced closure. The insurer denied coverage to the insured, arguing that the insured's negligent performance of its contract was excluded by the "performance" exclusion.

The majority of the court rejected that argument, holding that there is nothing in the exclusion to show that "negligent performance of a contract makes the exclusion operative."[730] The minority rejected this position, holding that the language of the exclusion clearly and unambiguously provided that if the insured delayed in the performance of a contract, causing loss of use, but no damage to tangible property, the "performance" exclusion applied. The language of the exclusion did not require that the delay be unintentional--only that it occurred. It was not disputed that the insured's job performance was delayed, and therefore there was no insurance coverage for the claim.

The better opinion on this issue appears to be the Louisiana Supreme Court's decision in Cute'-Togs.[731] As "delay" and "lack of performance" are not modified by adjectives such as "intentional" or "deliberate", it must be concluded that the insured's liability for any "delay" or "lack of performance" of a contract, causing loss of use of tangible property will be withdrawn from coverage by the first clause of the "performance" exclusion.

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[729] 636 S.W. 2d 638 (Ark. App., 1982).

[730] Ibid. at p. 641-642.

[731] Supra, n. 724.

If the majority position in Geurin[732] is correct, the insuring intent behind the exclusion would be subverted. The insurer would become a guarantor of the insured's indifferent performance of its contract.[733] For example, presume the insured fuel dealer fails to deliver heating oil to an apartment building. As a result of the lack of heat, the tenants have to be evacuated. If the CGL Policy provided coverage for the loss of rent or the cost of relocating tenants, it would, in effect, become a guarantor of the insured's contractual obligations. However, if the water pipes burst due to non-delivery of heating oil, the cost of repair as well as the loss of use would be covered. In that case, there has been an accident or an occurrence resulting in damage to "tangible property" rather than a simple "failure of performance."[734]

To conclude this part, the "performance" exclusion is only directed to loss of use of tangible property that is not damaged. The first clause of the exclusion is intended to prevent the insurer from guaranteeing the insured's indifferent performance of its contracts. Hence, the insured's liability for any delay or lack of performance of a contract resulting in loss of use of tangible property is excluded, even if the delay is caused by the insured's negligence.

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[732] Supra, n. 728.

[733] See: Tinker, George H., *Comprehensive Liability Insurance -- Perspective and Overview*, 25 Federation of Insurance Counsel Quarterly, No. 3, (Spring, 1975), at 217-318, at p. 279.

[734] This example is taken from Reichenberger, supra, n. 716, at p.16.

12.2 THE FAILURE OF THE NAMED INSURED'S PRODUCTS TO MEET WARRANTED FITNESS LEVELS

There has been remarkably little judicial consideration of the second clause of the "performance" exclusion.

In Williamson v. Alewine,[735] the insured, whose business it was to repair trucks, was sued for its failure to properly repair a truck. Damages were claimed for (1) the amount already paid to the insured for repairs; (2) future repairs necessitated by the insured's faulty repair; (3) loss of profits due to delay in repair. The court held that the first and second heads of the claim were excluded by the "work performed" exclusion. The third was excluded by the first and second clause of the "performance" exclusion as they:

> exclude loss of use of property as a result of a lack of performance of a contract or agreement by the insured, or failure of the insured's work product to meet the level of performance, fitness, etc., represented by the insured.[736]

The Williamson[737] decision is an example of the insured's work product failing to achieve the level of performance warranted by the insured. This is precisely what the second clause of the "performance" exclusion withdraws from coverage. Another example stems from the facts of a Canadian case, Ocean Construction Supplies Ltd. v. Continental Insurance Co.[738]

In that case the insured breached its warranty that its product would make the third party's floating oceanarium more buoyant. The insured's product simply did not perform as the insured represented it would. The property damage sustained by the third party, and for which damages were claimed, can be divided into two categories: (1) damage to tangible property (remedial work -- ie., expenses and labour costs to remove the insured's product); and (2) damage to intangible property (lost profits suffered while the vessel was undergoing repair, extra insurance premiums incurred due to the shut-down of the vessel, and the cost of installing temporary styrofoam under the vessel to keep it afloat while it was being repaired).

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[735] 417 So. 2d 64 (La. App., 1982).

[736] Ibid. at p. 66.

[737] Supra, n. 734.

[738] [1978] 5 W.W.R. 681 (B.C. S.C. T.D.).

The court properly held that the "work product" exclusion did not apply because the insured's product was not damaged. The damage was to the third party's property--both tangible and intangible. As the policy in question referred to "injury or destruction of property", all of the third party's claim was within coverage.

If the insured was covered under the 1978 I.B.C. CGL standard form policy, it may not have been so fortunate. There would be coverage for any proven *physical* injury to the third party's tangible property caused by an accident or an occurrence. Damage to intangible property would have been recoverable to the extent that it provides an economic yardstick of the physical damage sustained. Exclusion (k) would have no application. The claim for intangible damage is a claim for loss of use of tangible property that has been physically injured.

However, if the evidence neither supported the conclusion that the property had been physically injured, nor that it had been caused by an accident or occurrence, no part of the claim would have been covered. The damage to tangible property would not constitute *physical injury* to tangible property as required by part (1) of the definition of property damage, and the claim for loss of use of tangible property was not caused by an accident or an occurrence as per part (2) of the same definition.

If the damage sustained was held to have been caused by an accident or an occurrence, then the "loss of use of tangible property not physically injured or destroyed", would be property damage as defined, but the insured's liability for that property damage would be excluded from coverage by the second clause of the "performance" exclusion, as it was caused by the failure of the insured's product to perform as represented.

To conclude this part, there has been remarkably little judicial consideration of the second clause of the "performance" exclusion. Perhaps this is due to the wording of that clause which attempts to clearly and unambiguously exclude the insured's liability for a product that fails to perform as warranted, and does not cause any physical damage.

12.3 THE SAVING PROVISION OF THE "PERFORMANCE" EXCLUSION

The "performance" exclusion is specifically limited so as not to apply to:

> ...loss of use of other tangible property resulting from the sudden and accidental physical injury to or destruction of the **Named Insured's products** or work performed by the named Insured after such products or work have been put to use by any person or organization other than an insured;

There does not appear to be any reported judicial opinions construing this clause. Its salient feature it that it applies only to *other* tangible property; ie., tangible property other than the Named Insured's products (as defined), and work performed by the

Named Insured or anyone on its behalf. Once the insured's product or the work performed by the insured is physically injured or destroyed by a sudden and accidental event, any resulting claim for loss of use of that other property will be exempt from the performance exclusion, regardless of whether that other property is physically injured or destroyed. The reference to an "accidental" event makes it clear that the damage must be neither expected nor intended from the standpoint of the insured. Further, the sudden and accidental event must have occurred *after* such products or work have been put to use by any person or organization. The word "use" was considered in Chapter 9.

To conclude this part, the saving provision of the "performance" exclusion only applies when the insured's product or work is physically injured or destroyed by a sudden and accidental event occurring after it has been put to use by any person or organization other than an insured. Any claim for loss of use of other tangible property, caused by that event, would be outside the scope of the "performance" exclusion--regardless of whether that other property is physically injured or destroyed.

12.3 CONCLUSION

The "contractual liability", "product itself", and "work performed" exclusions are placed in the CGL Policy to prevent the coverage afforded from being construed as a guarantee of the insured's products or contractual obligations. The insured is in the best position to judge the risk that it products or work might fail to achieve a warranted level of effectiveness. These risks are beyond the purview of standard form, general liability insurance.

Accordingly, Canadian courts must follow the majority in Cute'-Togs',[739] and the minority in Geurin[740] by interpreting "delay", and "lack of performance" as they appear in clause (1) of the "performance" exclusion to encompass intentional and unintentional delay. The language of clause (2) of the "performance" exclusion is clear. The CGL Policy will not cover the risk that the insured's products or work will not perform as warranted.

The saving provision of the "performance" exclusion is redundant by stating the obvious. The CGL Policy covers the insured's liability to compensate third persons because of a fortuitous event arising out of its products or work. This is the type of risk that insurers can economically underwrite through standard form insurance.

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[739] Supra, n. 724.

[740] Supra, n. 728.

Chapter 13

Conclusion

Mr. Hoegy, Mr. MacDougall, and a company called Tiko Electric Ltd. all purchased CGL policies. Mr. Hoegy was in the crop spraying business. Mr. MacDougall repaired machinery. Tiko Electric Ltd. was a small electrical contractor. All three insureds found themselves in strikingly similar circumstances. Each of them were sued by customers because they were negligent in the performance of their work. Mr. Hoegy sprayed a flax crop when it was too far advanced, causing the crop to die. Mr. MacDougall accidentally destroyed a machine while repairing it. An employee of Tiko Electric accidentally double reversed the wiring of a five ton overhead hoist, cracking the casing, and burning out the motor. All of them turned to their CGL policies and discovered to their horror that they were not protected against these losses. No doubt they asked themselves how it could possibly be that they were issued policies that did not cover incidents like these--after all that is why they bought the policies in the first place.

Presumably the reason why they were issued these policies is because their agent or broker did not ask them enough questions about their businesses when they applied for this type of insurance and did not determine the kind of risks they faced. If this type of discussion did take place, the agent was not familiar enough with the CGL policy to realize that these risks were withdrawn from coverage. The agent would have drawn up an application for insurance which would have described the nature of the business performed. That application would have been sent to the insurer. The underwriting department of the insurer would have received the application. An employee of that department would have reviewed the application, noted the insured's business, checked to make sure the company's underwriting guide-lines were met, determined that the proposed premium was accurate, and approved the application. This person obviously did not understand the CGL policy. If he did, he would have immediately realized that the standard CGL policy was not suited for the business each of these insureds were in. For example, it is not difficult to foresee that a crop sprayer's principle liability is that he might damage the crop that he sprays. With suitable endorsements added to the policy this type of liability would be covered.

Faced with a crippling loss, and a denial of coverage, each of these insureds sued.[741] The courts were asked to determine if the coverage denial was proper. Out of sympathy to the insureds, the courts construed the policies in such a way that it could conclude that the losses were covered. These decisions twist the clear words of the policy and force it to cover situations it was never designed to cover. Mathewson, C.C.J. of the Ontario County Court, who heard the plight of the Tiko Electric Company Limited, stated:

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[741] Hoegy v. General Accident Assurance Co. of Canada (1977), 75 D.L.R. (3d) 44 (Ont. H.C.); MacDougall v. Casualty Company of Canada, Ontario High Court, Reid J., October 19, 1980, unreported; Tiko Electric Co. Ltd. v. The Canadian Surety Co. Ltd., [1973] I.L.R. 750 (para. 1-573) (Ont. Co. Ct.).

> I had difficulty imagining what manner of misadventure causing damage counsel for the Defendant insurer regarded as properly within the coverage of this Policy. He volunteered that the dropping of a screwdriver on someone's head might be a case that would be covered. If this is the character of the protection afforded by The Canadian Surety Company Limited this Policy represents a monstrous fraud upon the electrical trade...
>
> An electrician handed this insurance document providing comprehensive coverage for his trade would have reason to suppose that he was amply covered for the normal accidents resulting from faulty electrical wiring and defective installation of electrical fixtures or appliances. The Plaintiff surely must be deemed to have paid for something more valuable than false security and the possibility of pressing a hopeless lawsuit against a cunning and ingenious Insurer.[742]

The immediate result of these decisions is that after protracted legal proceedings each of the insureds received the coverage they thought they were entitled to in the first place. The long term result of these decisions, and others like them, is that insurers are forced to pay out claims that were never contemplated when the premiums were established. This leads to underwriting losses and premium increases to compensate for these losses. This is another, more subtle, and yet more pervasive reason for the insurance "crisis" described in Chapter 1.

The onus lies with the insurers to ensure that the agents and brokers that sell their policies understand them. They must ensure that their underwriting departments are fully familiar with the policy so that they can be an effective check on the work of the agents and brokers. It is imperative that this education process begin.

The business world, like underwriters, agents, and brokers are also in need of education. Unfortunately, most businesses treat insurance as a necessary evil. In their attempts to get the most coverage for the least cost, they fail to properly assess what it is that they are buying. Consequently, they end up in the situations which Messrs. Hoegy and MacDougall found themselves in. They must be as careful and selective about buying insurance as they are about purchasing supplies and leasing office space. Insurance needs must be continually re-assessed to ensure that they have that they have the right kind of coverage at all times.

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[742] Tiko Electric Co. Ltd. v. The Canadian Surety Co. Ltd., supra, n. 740, at p. 754.

Hopefully this work will shed insight on the CGL policy and will aid in this education process. It is unfortunate that time did not permit an examination of the defence obligations, and the remaining exclusions. However, the intent was not to provide the reader with an annotation of the CGL policy but an understanding of what the policy is intended to cover. The 1978 I.B.C. CGL model wording is not as clear in areas as it should be. For example, exclusion (h) the "fire and property damage liability exclusion", discussed in Chapter 9, could bear re-writing. On the whole, however it is a workable document that does what it sets out to do: provide protection to the insured when its goods or services injure or damage others. It does not guarantee the quality of the product or the workmanship provided. It does not protect against those risks that the insured appreciated were present but ignored, thinking that should they occur, the litigation costs will be less then the profit to be derived from persisting. No insurance should cover that type of business risk.

The type of education advocated here would be a cost saving measure for the insurance industry. It would reduce the volume of claims, and the chance of adverse judicial construction of the policy. This is where the industry's efforts should be directed in this decade. Failure to do this will result in the public losing all trust in and respect for the industry. It will also doom even the clearest type of policy, including the 1986 I.B.C. model "claims made" and occurrence" forms, discussed in Chapter 1.

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Appendix "A"

ifc forms service	LIABILITY	Form No. 32000 Edition Date 6-78 Size

IBC 2000
6 - 78

LIABILITY POLICY

INSURANCE CO.

HEAD OFFICE — CANADA
(hereinafter called the Insurer)

POLICY NO.
Agent

The Insurer, in consideration of the payment of the premium, in reliance upon the statements in the declarations made a part hereof and subject to all the terms of this policy, agrees with the Named Insured as follows:

DECLARATIONS

1. Named Insured

Address

2. Business of Named Insured is

The Named Insured is INDIVIDUAL ☐; PARTNERSHIP ☐; CORPORATION ☐; JOINT VENTURE ☐;

OTHER

3. Policy Period From	Day Month Year	To	Day Month Year	12:01 A.M., Standard Time, at the address of the Named Insured as stated herein.

4. Coverage and Premium – The insurance afforded under this policy is only with respect to the coverage rider(s) indicated below and for which a premium charge is specified.

RIDER(S)		PREMIUM
		$
	TOTAL OR ADVANCE PREMIUM $	

Countersigned by ______________________________ Authorized Representative

I.B.C. POLICY SHELL
See 33000 for Composite Mercantile or Commercial Policy divider.

(ALL PROVINCES)

SPECIMEN

ifc forms service

Form No.: 32000
Edition Date: 6-78
Size:

IBC 2000 (Continued)

6 - 78

SPECIMEN

DEFINITIONS

When used in this policy (including endorsements forming a part hereof):

"automobile" means any self-propelled land motor vehicle, trailers or semi-trailers while attached thereto or unattached (including its equipment mounted on or attached thereto) other than any of the following or their trailers, accessories and equipment:

(i) vehicles of the crawler type (other than motorized snow vehicles).
(ii) tractors (other than road transport tractors designed to haul trailers or semi-trailers), road rollers, graders, scrapers, bulldozers, paving machines and concrete mixers (other than concrete mixers of the mix-in-transit type).
(iii) other construction machinery or equipment mounted on wheels but not self propelled while not attached to any self-propelled land motor vehicle.
(iv) self propelled land motor vehicles used solely on the premises of the Insured.

"bodily injury" means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom.

"completed operations hazard" includes bodily injury or property damage arising out of operations, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the Named Insured. Operations include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:

(i) when all operations to be performed by or on behalf of the Named Insured under the contract have been completed.
(ii) when all operations to be performed by or on behalf of the Named Insured at the site of the operations have been completed.
(iii) when the portion of the work out of which the bodily injury or property damage arises has been put to its intended use by any persons or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete shall be deemed completed.

The completed operations hazard shall not include:

(i) operations in connection with the pick up and delivery of property.
(ii) the existence of tools, uninstalled equipment or abandoned or unused materials.

"elevator" means any hoisting or lowering device to connect floors or landings whether or not in service, and all appliances thereof, including any car, platform, shaft, hoistway, stairway, runway, power equipment and machinery, but shall not include:

(i) dumbwaiters, the floor area of which does not exceed 9 square feet, and used exclusively for carrying property.
(ii) hod or material hoists used in connection with alterations, construction or demolition operations.
(iii) inclined conveyors used exclusively for carrying property.
(iv) automobile servicing hoists.

"incidental contract" means any written agreement which is a lease of premises, easement agreement, agreement required by municipal ordinance, sidetrack agreement or elevator maintenance agreement.

"Insured" means any person or organization qualifying as an Insured in the "Persons Insured" provision of the applicable coverage rider. The insurance afforded applies separately to each Insured against whom claim is made or suit is brought, except with respect to the limits of the Insurer's liability.

"Named Insured" means the person or organization named in the Declarations of this policy.

"Named Insured's products" means goods or products manufactured, sold, handled or distributed by the Named Insured or by others trading under his name, including any container thereof (other than a vehicle), but shall not include a vending machine or any property other than such container, rented to or located for use of others but not sold.

"policy territory" means:

(i) Canada or the United States of America, its territories or possessions, or
(ii) anywhere in the world with respect to compensatory damages because of bodily injury or property damage arising out of a product which was sold for use or consumption within the territory described in paragraph (i) above, provided suit for such compensatory damages is brought within such territory.

"products hazard" includes bodily injury and property damage arising out of the Named Insured's products but only if such bodily injury or property damage occurs away from premises owned by or rented to the Named Insured and after physical possession of such products has been relinquished to others.

"property damage" means (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an accident occurring during the policy period.

ENVIRONMENTAL LIABILITY EXCLUSION

It is agreed that this policy does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapours, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water of any description no matter where located or how contained, or into any watercourse, drainage or sewage system, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

NUCLEAR ENERGY LIABILITY EXCLUSION

(Applicable to all coverage riders other than Comprehensive Personal Liability, Farmer's Comprehensive Liability and Storekeepers Liability.)

It is agreed that this policy does not apply to bodily injury or property damage:

(a) with respect to which an Insured under this policy is also insured under a contract of nuclear energy liability insurance (whether the Insured is unnamed in such contract and whether or not it is legally enforceable by the Insured) issued by the Nuclear Insurance Association of Canada or any other group or pool of insurers or would be an Insured under any such policy but for its termination upon exhaustion of its limit of liability, or
(b) resulting directly or indirectly from the nuclear energy hazard arising from:
  (1) the ownership, maintenance, operation or use of a nuclear facility by or on behalf of an Insured;
  (2) the furnishing by an Insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, and
  (3) the transportation, consumption, possession, handling, disposal or use of radioactive material sold, handled, used or distributed by an Insured.

As used in this policy:

1. The term "nuclear energy hazard" means the radioactive, toxic, explosive, or other hazardous properties of radioactive material.
2. The term "radioactive material" means uranium, thorium, plutonium, neptunium, their respective derivatives and compounds, radioactive isotopes of other elements and any other substances that the Atomic Energy Control Board may, by regulation, designate as being prescribed substances capable of releasing atomic energy, or as being requisite for the production, use, or application of atomic energy.
3. The term "nuclear facility" means:
  (a) any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of plutonium, thorium and uranium or any one or more of them;
  (b) any equipment or device designed or used for (i) separating the isotopes of plutonium, thorium and uranium or any one or more of them, (ii) processing or utilizing spent fuel, or (iii) handling, processing or packaging waste;
  (c) any equipment or device used for the processing, fabricating or alloying of plutonium, thorium and uranium or any one or more of them if at any time the total amount of such material in the custody of the Insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235.
  (d) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste radioactive material;

and includes the site on which any of the foregoing is located, together with all operations conducted thereon and all premises used for such operations.

ifc forms service

Form No. 32000
Edition Date 8-78
Size

IBC 2000 (Continued)
8-78

CONDITIONS

SPECIMEN

1. **Premium and Adjustment of Premiums:**
   (a) Unless otherwise stated, the premium stated in the declarations is an estimated deposit premium only. Adjustment of premium shall be made at least annually and for this purpose the premium bases and rates shown in the declarations or in any endorsement attached hereto, shall be used in ascertaining the earned premium with respect to the specific hazards mentioned herein.
   (b) In the case of any hazards existing and covered under coverage rider(s) attached but not specified in the declarations, or in any endorsement the earned premium with respect thereto shall be computed in accordance with the Insurer's rules, rates, rating plans and minimum premiums applicable to such hazards.
   (c) Subject to the retention by the Insurer of the minimum premium provided for in the Declarations, if the earned premium for this policy thus computed exceeds the estimated deposit premium paid, the Named Insured shall pay such excess to the Insurer; on the other hand, if the estimated deposit premium exceeds the earned premium, the Insurer shall return to the Named Insured such excess.
   (d) The Named Insured shall maintain for each hazard hereby insured against, a record of the information necessary for premium computation on the basis stated, and shall submit such record to the Insurer at the end of the policy period and at such other times during the policy period as the Insurer may direct.

2. **Inspection — Audit**
   The Named Insured shall permit the Insurer to inspect the insured premises, operations and elevators and to examine and audit the Named Insured's books and records at any time during the policy period (and any extension thereof and within one year after the termination of this policy), as far as they relate to the premium bases or the subject matter of this insurance. The Insurer assumes no responsibility and waives no rights by reason of such inspection, examination, audit or the omission thereof.

3. **Insured's Duties in the event of Accident, Occurrence, Claim or Suit:**
   (a) In the event of an accident or occurrence, written notice containing particulars sufficient to identify the Insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given promptly by or for the Insured to the Insurer or any of its authorized agents.
   (b) If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Insurer every writ, letter, document or advice received by him or his representative.
   (c) The Insured shall co-operate with the Insurer and, upon the Insurer's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the Insured because of injury or damage with respect to which insurance is afforded under this policy; and the Insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for the first aid to others at the time of accident.

4. **Action against Insurer:**
   No action shall lie against the Insurer unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Insurer. Every action or proceeding against the Insurer shall be commenced within one year next after the date of such judgment or written agreement and not afterwards. Nothing contained in this policy shall give any person or organization any right to join the Insurer as a co-defendant in any action against the Insured to determine the Insured's liability.
   Bankruptcy or insolvency of the Insured or of the Insured's estate shall not relieve the Insurer of any of its obligations hereunder.

5. **Subrogation:**
   In the event of any payment under this policy, the Insurer shall be subrogated to all the Insured's rights of recovery therefor against any person or organization and the Insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Insured shall do nothing after loss to prejudice such rights.

6. **Other Insurance:**
   The insurance afforded by this policy is primary insurance, except when stated to apply in excess of or contingent upon the absence of other insurance. When this insurance is primary and the Insured has other insurance which is stated to be applicable to the loss on an excess or contingent basis the amount of the Insurer's liability under this policy shall not be reduced by the existence of such other insurance. When both this insurance and other insurance apply to the loss on the same basis, whether primary, excess or contingent, the Insurer shall not be liable under this policy for a greater proportion of the loss than that stated in the applicable contribution provision below:
   (a) Contribution by Equal Shares:
   If all of such other valid and collectible insurance provides for contribution by equal shares, this Insurer shall not be liable for a greater proportion of such loss than would be payable if each insurer contributes an equal share until the share of each insurer equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid, and with respect to any amount of loss not so paid the remaining insurers then continue to contribute equal shares of the remaining amount of the loss until each such insurer has paid its limit in full or the full amount of the loss is paid.
   (b) Contribution by Limits:
   If any of such other insurance does not provide for contribution by equal shares, this Insurer shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

7. **Changes:**
   Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Insurer from asserting any right under the terms of this policy, nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy.

8. **Assignment:**
   Assignment of interest under this policy shall not bind the Insurer until its consent is endorsed hereon; if, however, the Named Insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless cancelled, shall, if written notice be given to the Insurer within sixty days after the date of such death or adjudication, cover the Named Insured's legal representative as the Named Insured.

9. **Notice:**
   Any written notice to the Insurer may be delivered at or sent by registered mail to the agent through whom this policy was issued or to any branch of the Insurer in Canada. Written notice may be given to the Named Insured by letter personally delivered to him or by registered letter addressed to him at his last post office address notified to the Insurer, or where no address is notified and the address is not known, addressed to him at the post office of the agency, if any, from which the application was received. In this condition the expression "registered" shall mean registered within or without Canada. Notice to the first Named Insured shall constitute notice to all Named Insureds.

10. **Cancellation – Termination:**
   (a) This policy may be terminated,
      (i) by the Insurer giving to the Named Insured 15 days' notice of termination by registered mail or 5 days' written notice of termination personally delivered,
      (ii) by the Named Insured at any time on request.
   (b) Where the policy is terminated by the Insurer,
      (i) and where the premium is developed on other than an estimated basis, the Insurer will refund the excess of the paid premium for the time the policy has been in force, calculated pro rata, or
      (ii) where the premium is developed by an estimated basis, the Insurer will refund the excess of the premium above the premium earned, when determined.
   (c) Where the policy is terminated by the Named Insured,
      (i) and where the premium is developed on other than an estimated basis, the Insurer will refund the excess of the paid premium above the short rate premium for the time the policy has been in force calculated in accordance with the short rate premium table in use by the Insurer, subject to the retention of the minimum premium, if any, provided by the policy, or
      (ii) where the premium is developed by an estimated basis, the Insurer will refund the excess of the paid premium above the premium earned, when determined, subject to the retention of the minimum premium, if any, provided by the policy.
   (d) Refund of premium may be made by money, postal or express company money order or by cheque payable at par.
   (e) The fifteen days mentioned above in this condition commences to run on the day following the receipt of the registered letter at the post office to which it is addressed.
   (f) Premium adjustment may be made at the time cancellation is effected and if not then made shall be made as soon as practicable after cancellation becomes effective but payment or tender of unearned premium is not a condition of cancellation.

11. **Declarations:**
   By acceptance of this policy, the Named Insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the Insurer or any of its agents relating to this insurance.

IN WITNESS WHEREOF, the Insurer has caused this policy to be signed by its [executive officer(s)], but the same shall not be binding upon the Insurer unless countersigned by an authorized representative of the Insurer.

ifc forms service	LIABILITY	Form No.: 32001 Edition Date: 6-78 Size:

IBC 2001
6-78

COMPREHENSIVE GENERAL LIABILITY COVERAGE RIDER

Attached to and forming part of this Policy

ADDITIONAL DECLARATIONS

The following discloses all hazards insured hereunder known to exist at the effective date of this policy, unless otherwise stated herein.

SCHEDULE

The insurance afforded is only with respect to such of the following Coverages as are indicated by specific premium charge or charges. The limit of the Insurer's liability against each such Coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

Coverages		Limits of Liability		Advance Premium
Separate Limits	A. Bodily Injury Liability	\$ \$ \$	each person each occurrence aggregate	\$
	B. Property Damage Liability	\$ \$	each accident aggregate	
Inclusive Limit	A. Bodily Injury Liability and B. Property Damage Liability	\$ \$	bodily injury each occurrence property damage each accident aggregate	
Minimum Premium \$			Total Advance Premium	

Description of Hazards	Premium Bases	Rates		Advance Premium	
		B.I.	P.D.	B.I.	P.D.
Premises—Operations (List all locations owned, rented or controlled by Named Insured stating interest as owner, lessee or tenant.)	(a) Area (sq. ft.) (b) Remuneration (c) Receipts (d)	(a) Per 100 sq. ft. of Area (b) Per \$1000. Remuneration (c) Per \$1000. of Receipts (d)			
Elevators (Describe)	Number	Per Elevator			
Independent Contractors (Lot or Sub-let work)	Cost of Work	Per \$1,000 of Cost of Work			
Products	Sales	Per \$1,000 of Sales			
Completed Operations	Receipts	Per \$1,000 of Receipts			
Other hazards or endorsements					

SPECIMEN

See 33201 for Composite Mercantile or Commercial Policy rider.

IBC 2001 (Continued)
6-78

INSURING AGREEMENTS

I. Coverage A — Bodily Injury Liability

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as compensatory damages because of bodily injury.

Coverage B — Property Damage Liability

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as compensatory damages because of property damage caused by accident.

II. Defence — Settlement — Supplementary Payments

As respects insurance afforded by this policy, the Insurer shall:

(1) defend in the name and on behalf of the Insured and at the cost of the Insurer any civil action which may at any time be brought against the Insured on account of such bodily injury or property damage but the Insurer shall have the right to make such investigation, negotiation and settlement of any claim as may be deemed expedient by the Insurer;

(2) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds;

(3) pay all costs taxed against the Insured in any civil action defended by the Insurer and any interest accruing after entry of judgment (or, in those jurisdictions where statute prescribes interest from some other date, from such prescribed date) upon that part of the judgment which is within the limits of the Insurer's liability;

(4) pay expenses incurred by the Insured for such immediate medical and surgical relief to others as shall be imperative at the time of accident;

(5) pay reasonable expenses incurred by the Insured at the Insurer's request in assisting the Insurer in the investigation or defense of any claim or suit, including actual loss of earnings not to exceed $25. per day.

The amounts so incurred except settlement of claims or suits are payable in addition to the applicable limits of liability.

III. Persons Insured

Each of the following is an Insured under this insurance to the extent set forth below:

(1) if the Named Insured is designated in the declarations as an individual, the person so designated but only with respect to the conduct of a business of which he is the sole proprietor;

(2) if the Named Insured is designated in the declarations as a partnership or joint venture, the partnership or joint venture so designated and any partner or member thereof but only with respect to his liability as such;

(3) if the Named Insured is designated in the declarations as other than an individual, partnership or joint venture, the organization so designated and any executive officer, director or stockholder thereof while acting within the scope of his duties as such;

(4) any person (other than an employee of the Named Insured) or organization while acting as real estate manager for the Named Insured.

This insurance does not apply to bodily injury or property damage arising out of the conduct of any partnership or joint venture of which the Insured is a partner or member and which is not designated in this policy as a Named Insured.

IV. Policy Territory

This insurance applies only to bodily injury and property damage which occurs within the policy territory.

EXCLUSIONS

This insurance does not apply to:

(a) liability assumed by the Insured under any contract or agreement except an incidental contract, but this exclusion does not apply to a warranty of fitness or quality of the Named Insured's products or a warranty that work performed by or on behalf of the Named Insured will be done in a workmanlike manner;

(b) bodily injury or property damage arising out of the ownership, maintenance, use or operation by or on behalf of the Insured of any automobile;

(c) bodily injury or property damage arising out of the ownership, maintenance, use, operation, loading or unloading by or on behalf of the Insured of any watercraft, but this exclusion does not apply to watercraft while ashore on premises owned by, rented to or controlled by the Named Insured;

(d) (1) bodily injury or property damage arising out of the ownership, maintenance, use, operation, loading or unloading by or on behalf of the Insured of
  (i) any aircraft, or
  (ii) any air cushion vehicle;

  (2) bodily injury or property damage arising out of the ownership, existence, use or operation by or on behalf of the Insured of any premises for the purpose of an airport or aircraft landing strip and all operations necessary or incidental thereto;

(e) bodily injury to any employee of the Insured arising out of and in the course of his employment by the Insured, but this exclusion does not apply to liability assumed by the Insured under an incidental contract;

(f) any obligation for which the Insured or his Insurer may be held liable under any workmen's compensation law;

(g) bodily injury caused intentionally by or at the direction of the Insured;

(h) property damage to
  (1) property owned or occupied by or rented to the Insured, or
  (2) property used by the Insured, or
  (3) property in the care, custody or control of the Insured or property as to which the Insured is for any purpose exercising physical control, or
  (4) any personal property or any fixtures as the result of any work performed thereon by the Insured or anyone on his behalf;

but parts (2) and (3) of this exclusion do not apply with respect to liability under a written sidetrack agreement and part (3) of this exclusion does not apply with respect to property damage (other than to elevators) arising out of the use of an elevator at premises owned by, rented to or controlled by the Named Insured;

(i) property damage to the Named Insured's products arising out of such products or any part of such products;

SPECIMEN

IBC 2001 (Continued)
6-78

EXCLUSIONS (Continued)

(j) property damage to work performed by or on behalf of the Named Insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith;

(k) to loss of use of tangible property which has not been physically injured or destroyed resulting from

(1) a delay in or lack of performance by or on behalf of the Named Insured of any contract or agreement, or

(2) the failure of the Named Insured's products or work performed by or on behalf of the Named Insured to meet the level of performance, quality, fitness or durability warranted or represented by the Named Insured;

but this exclusion does not apply to loss of use of other tangible property resulting from the sudden and accidental physical injury to or destruction of the Named Insured's products or work performed by or on behalf of the Named Insured after such products or work have been put to use by any person or organization other than an Insured.

(l) expenses incurred for the withdrawal, inspection, repair, replacement, or amounts claimed for loss of use of the Named Insured's products or work completed by or for the Named Insured or of any property of which such products or work form a part, if such products, work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein.

(m) bodily injury or property damage due to war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military power.

(n) Nuclear Energy Liability – see exclusion herein;

(o) Environmental Liability – see exclusion herein.

LIMITS OF LIABILITY

Regardless of the number of (1) Insureds under this policy (2) persons or organizations who sustain bodily injury or property damage or (3) claims made or suits brought on account of bodily injury or property damage, the Insurer's liability is limited as follows:

1. **Limits of Liability Coverage A** The limit of bodily injury liability stated in the schedule as applicable to "each person" is the limit of the Insurer's liability for all compensatory damages, including compensatory damages for care and loss of services, arising out of bodily injury sustained by one person in any one occurrence; the limit of such liability stated in the schedule as applicable to "each occurrence" is, subject to the above provision respecting each person, the total limit of the Insurer's liability for all compensatory damages, including compensatory damages for care and loss of services, arising out of bodily injury sustained by two or more persons in any one occurrence.

2. **Limits of Liability Coverage B** The limit of property damage liability stated in the schedule as applicable to "each accident" is the total limit of the Insurer's liability for all compensatory damages arising out of property damage, as the result of any one accident, or series of accidents arising out of one event.

3. Subject to the above provision respecting "each person" and "each occurrence" under Coverage A, and "each accident" under Coverage B, the limits of bodily injury liability and property damage liability stated in the schedule as "aggregate" are respectively the total limits of the Insurer's liability for all compensatory damages arising out of the products hazard and completed operations hazard in any one period of twelve months terminating on an anniversary of the inception date of the policy.

4. **Limits of Liability Coverages A and B** The inclusive limit of liability stated in the schedule as applicable to "bodily injury each occurrence property damage each accident" is the total limit of the Insurer's liability under Coverages A or B or Coverages A and B combined for all compensatory damages, including compensatory damages for care and loss of services, arising out of bodily injury in any one occurrence or property damage as a result of any one accident or series of accidents arising out of one event.

5. Subject to the above provision respecting "bodily injury each occurrence property damage each accident" under Coverage A and B combined, the limit of bodily injury and property damage liability combined stated in the schedule as "aggregate" is the total limit of the Insurer's liability for all compensatory damages arising out of the products hazard and completed operations hazard in any one period of twelve months terminating on an anniversary of the inception date of the policy.

6. All compensatory damages arising out of one lot of goods or products prepared or acquired by the Named Insured or by another trading under his name, shall be considered as arising out of one occurrence as regards bodily injury liability and one accident as regards property damage liability.

7) For the purpose of determining the limit of the Insurer's liability, all bodily injury arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence.

SPECIMEN

DESCRIPTION OF TERMS USED FOR PREMIUM BASES

1. "Area" means the square footage of the buildings to be insured excluding that portion of the basement used exclusively for storage or that portion of the premises used for heating or air conditioning plant purposes.
2. "Cost of work" means the total cost of all operations performed for the Named Insured during the policy period by independent contractors, including materials used or delivered for use by whomsoever supplied, except maintenance or ordinary alterations and repairs on premises owned or rented by the Named Insured.
3. "Receipts" means the gross amount of money charged by the Named Insured for such operations as are rated on a receipts basis during the policy period.
4. "Remuneration" means the total earnings during the policy period for each owner, partner, executive officer or employee.
5. "Sales" means the gross amount of money charged for all goods and products sold and distributed by the Named Insured or by others trading under his name during the policy period.

Appendix "B"

IBC 2200
8-87

Commercial General Liability Policy

INSURANCE CO.

Head Office – Canada

POLICY NO.

Agent/Broker

In return for the payment of the premium, and subject to all the terms of this policy, we agree with you to provide the insurance as stated in this policy.

DECLARATIONS

1. Named Insured

Address

2. Policy Period From	Day Month Year	To	Day Month Year	12:01 A.M., Standard Time, at your address shown above.

3. LIMITS OF INSURANCE

AGGREGATE LIMIT	Each Occurrence Limit	Personal Injury Limit	Tenants' Legal Liability Limit	Medical Expense Limit
$	$	$	$ Any One Premises	$ Any One Person

4. Retroactive Date:
Coverages A and D of this insurance do not apply to "bodily injury" or "property damage" which occurred before the Retroactive Date, if any, shown below:
Retroactive Date: ______________________ (Enter Date or "None" if no Retroactive Date applies)

5. Form of Business:
INDIVIDUAL ☐ ; JOINT VENTURE ☐ ; PARTNERSHIP ☐ ; ORGANIZATION ☐ ; (Other than Partnership or Joint Venture)

6. Business Description: ______________________

7. Location of All Premises You Own, Rent or Occupy:
____
____

8. Classification	Code No.	Premium Basis	Rate	Advance Premium

9. Minimum Premium $ __________ TOTAL PREMIUM $ __________

10. Endorsements Attached To This Policy:

COUNTERSIGNED BY ______________________ by ______________________
(Date) (Authorized Representative)

____
(Insurer's Signature)

IBC 2100
8-87

COMMERCIAL GENERAL LIABILITY POLICY

Read Your Policy Carefully

DECLARATIONS PAGE
- Named Insured and Address
- Policy Period
- Coverages and Limits of Insurance
- Form, Description and Location of Business

SECTION I – COVERAGES		Beginning on Page
Coverage A – Bodily Injury and Property Damage Liability	Insuring Agreement	1
	Exclusions	1
Coverage B – Personal Injury Liability	Insuring Agreement	2
	Exclusions	2
Coverage C – Medical Payments	Insuring Agreement	2
	Exclusions	2
Coverage D – Tenants' Legal Liability	Insuring Agreement	3
	Exclusions	3
Common Exclusions		3
Supplementary Payments		4

SECTION II – WHO IS AN INSURED 4

SECTION III – LIMITS OF INSURANCE 4

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS 4
- Bankruptcy 4
- Canadian Currency Clause 4
- Cancellation 4
- Changes 5
- Duties in the Event of Occurrence, Claim or Action 5
- Examination of Your Books and Records 5
- Inspections and Surveys 5
- Legal Action Against Us 5
- Other Insurance 5
- Premium Audit 6
- Premiums 6
- Representations 6
- Separation of Insureds, Cross Liability 6
- Transfer of Rights of Recovery Against Others to Us 6
- Transfer of Your Rights and Duties Under this Policy 6

SECTION V – EXTENDED REPORTING PERIODS 6
SECTION VI – DEFINITIONS 6

COMMERCIAL GENERAL LIABILITY POLICY

COVERAGES A and D Provide Claims Made Coverage. Please Read The Entire Policy Carefully.

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.

The word "insured" means any person or organization qualifying as such under SECTION II – WHO IS AN INSURED.

Other words and phrases that appear in quotation marks have special meaning.

SECTION I – COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. **Insuring Agreement.**

We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage" to which this insurance applies but only if a claim for these compensatory damages is first made against any insured during the policy period. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGES A, B AND D. This insurance does not apply to "bodily injury" or "property damage" which occurred before the Retroactive Date, if any, shown in the Declarations or which occurs after the policy period. The "bodily injury" or "property damage" must be caused by an "occurrence". The "occurrence" must take place in the "coverage territory". We will have the right and duty to defend any "action" seeking those compensatory damages but:

a. The amount we will pay for compensatory damages is limited as described in SECTION III – LIMITS OF INSURANCE;

b. We may investigate and settle any claim or "action" at our discretion; and

c. Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A, B or D or medical expenses under Coverage C.

A claim by a person or organization seeking compensatory damages will be deemed to have been made when notice of such claim is received and recorded by any insured or by us, whichever comes first.

All claims for compensatory damages because of "bodily injury" to the same person, including damages claimed by any person or organization for care, loss of services, or death resulting at any time from the "bodily injury", will be deemed to have been made at the time the first of those claims is made against any insured.

All claims for compensatory damages because of "property damage" causing loss to the same person or organization as a result of an "occurrence" will be deemed to have been made at the time the first of those claims is made against any insured.

2. **Exclusions.**

This insurance does not apply to:

a. "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. "Bodily injury" or "property damage" for which the insured is obligated to pay compensatory damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for compensatory damages:

   1) Assumed in a contract or agreement that is an "insured contract"; or
   2) That the insured would have in the absence of the contract or agreement.

c. Any obligation of the insured under a workers compensation, disability benefits or unemployment compensation law or any similar law.

d. "Bodily injury" to an employee of the insured arising out of and in the course of employment by the insured.

   This exclusion applies:

   a) Whether the insured may be liable as an employer or in any other capacity; and
   b) To any obligation to share compensatory damages with or repay someone else who must pay compensatory damages because of the injury.

   This exclusion does not apply:

   i) To liability assumed by the insured under an "insured contract"; or
   ii) To employees on whose behalf contributions are made by or required to be made by the insured under the provisions of any workers compensation law.

e. 1) "Bodily injury" or "property damage" arising out of the ownership, use or operation by or on behalf of any insured of:

      a) Any "automobile";
      b) Any motorized snow vehicle or its trailers;
      c) Any vehicle while being used in any speed or demolition contest or in any stunting activity or in practice or preparation for any such contest or activity; or
      d) Any vehicle which if it were to be insured would be required by law to be insured under a contract evidenced by a motor vehicle liability policy, or any vehicle insured under such a contract, but this exclusion does not apply to the ownership, use or operation of machinery, apparatus or equipment mounted on or attached to any vehicle while at the site of the use or operation of such equipment.

   2) "Bodily injury" or "property damage" with respect to which any motor vehicle liability policy is in effect or would be in effect but for its termination upon exhaustion of its limit of liability or is required by law to be in effect.

This Exclusion e. does not apply to "bodily injury" to an employee of the insured on whose behalf contributions are made by or required to be made by the insured under the provisions of any workers compensation law.

f. "Bodily injury" or "property damage" arising out of the ownership, maintenance, use, operation, loading or unloading, or entrustment to others, by or on behalf of any insured of any watercraft.

   This exclusion does not apply to:

   1) A watercraft while ashore on premises you own or rent;
   2) A watercraft you do not own that is:
      a) Less than 8 metres long; and
      b) Not being used to carry persons or property for a charge.
   3) "Bodily Injury" to an employee of the insured on whose behalf contributions are made by or required to be made by the insured under the provisions of any workers compensation law.

g. 1) "Bodily injury" or "property damage" arising out of the ownership, maintenance, use, operation, loading or unloading, or the entrustment to others, by or on behalf of any insured of:

      a) Any aircraft; or
      b) Any air cushion vehicle.

   2) "Bodily injury" or "property damage" arising out of the ownership, existence, use or operation by or on behalf of any insured of any premises for the purpose of an airport or aircraft landing area and all operations necessary or incidental thereto.

h. "Property damage" to:

   1) Property you own, rent, or occupy;
   2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
   3) Property loaned to you;
   4) Personal property in your care, custody or control;

5) That particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the "property damage" arises out of those operations; or

6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraph 2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs 3), 4), 5) and 6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph 6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

i. "Property damage" to "your product" arising out of it or any part of it.

j. "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

k. "Property damage" to "impaired property" or property that has not been physically injured, arising out of:

1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

l. Any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

1) "Your product";

2) "Your work"; or

3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

m. Pollution Liability – See Common Exclusions.

n. Nuclear Liability – See Common Exclusions.

o. War Risks – See Common Exclusions.

COVERAGE B. PERSONAL INJURY LIABILITY

1. Insuring Agreement.

a. We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "personal injury" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGES A, B AND D. We will have the right and duty to defend any "action" seeking those compensatory damages but:

1) The amount we will pay for compensatory damages is limited as described in SECTION III – LIMITS OF INSURANCE;

2) We may investigate and settle any claim or "action" at our discretion; and

3) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A, B or D or medical expenses under Coverage C.

b. This insurance applies to "personal injury" only if caused by an offence:

1) Committed in the "coverage territory" during the policy period; and

2) Arising out of the conduct of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you.

2. Exclusions.

This insurance does not apply to:

"Personal injury":

1) Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;

2) Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;

3) Arising out of the wilful violation of a penal statute or ordinance committed by or with the consent of the insured; or

4) For which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for compensatory damages that the insured would have in the absence of the contract or agreement.

COVERAGE C. MEDICAL PAYMENTS

1. Insuring Agreement.

a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

1) On premises you own or rent;

2) On ways next to premises you own or rent; or

3) Because of your operations;

provided that:

a) The accident takes place in the "coverage territory" and during the policy period;

b) The expenses are incurred and reported to us within one year of the date of the accident; and

c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

1) First aid at the time of an accident;

2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and

3) Necessary ambulance, hospital, professional nursing and funeral services.

2. Exclusions.

We will not pay expenses for "bodily injury":

a. To any insured.

b. To a person hired to do work for or on behalf of any insured or a tenant of any insured.

c. To a person injured on that part of premises you own or rent that the person normally occupies.

d. To a person, whether or not an employee of any insured, who at the time of injury is entitled to benefits under any workers compensation or disability benefits law or a similar law.

e. To a person injured while taking part in athletics.

f. The payment of which is prohibited by law.

g. Included within the "products-completed operations hazard".

h. Excluded under Coverage A.

COVERAGE D. TENANTS' LEGAL LIABILITY

1. **Insuring Agreement.**

   We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "property damage" to which this insurance applies but only if a claim for these compensatory damages is first made against any insured during the policy period. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGES A, B AND D. This insurance applies only to "property damage" caused by fire, explosion, smoke or leakage from fire protective equipment to premises rented to you or occupied by you. This insurance does not apply to "property damage" which occurred before the Retroactive Date, if any, shown in the Declarations or which occurs after the policy period. The "property damage" must be caused by an "occurrence". The "occurrence" must take place in the "coverage territory". We will have the right and duty to defend any "action" seeking those compensatory damages but:

   a. The amount we will pay for compensatory damages is limited as described in SECTION III – LIMITS OF INSURANCE;
   b. We may investigate and settle any claim or "action" at our discretion; and
   c. Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A, B or D or medical expenses under Coverage C.

   A claim by a person or organization seeking compensatory damages will be deemed to have been made when notice of such claim is received and recorded by any insured or by us, whichever comes first.

All claims for compensatory damages because of "property damage" causing loss to the same person or organization as a result of an "occurrence" will be deemed to have been made at the time the first of those claims is made against any insured.

2. **Exclusions.**

   This insurance does not apply to:

   a. "Property damage" expected or intended from the standpoint of the insured.
   b. "Property damage" for which the insured is obligated to pay by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for compensatory damages that the insured would have in the absence of the contract or agreement.
   c. Pollution Liability – See Common Exclusions.
   d. Nuclear Energy Liability – See Common Exclusions.
   e. War Risks – See Common Exclusions.

COMMON EXCLUSIONS – COVERAGES A, C AND D

This insurance does not apply to:

1. **Pollution Liability**

   a. "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:
      1) At or from premises owned, rented or occupied by an insured;
      2) At or from any site or location used by or for an insured or others for the handling, storage, disposal, processing or treatment of waste;
      3) Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for an insured or any person or organization for whom the insured may be legally responsible; or
      4) At or from any site or location on which an insured or any contractors or subcontractors working directly or indirectly on behalf of an insured are performing operations:
         a) if the pollutants are brought on or to the site or location in connection with such operations; or
         b) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

   b. Any loss, cost, or expense arising out of any governmental direction or request that an insured test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

   "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

   Sub-paragraphs 1) and 4)a) of paragraph a. of this exclusion do not apply to "bodily injury" or "property damage" caused by heat, smoke or fumes from a hostile fire. As used in this exclusion, a "hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.

2. **Nuclear Energy Liability**

   a. Liability imposed by or arising under the Nuclear Liability Act;
   b. "Bodily injury" or "property damage" with respect to which an insured under this policy is also insured under a contract of nuclear energy liability insurance (whether the insured is unnamed in such contract and whether or not it is legally enforceable by the insured) issued by the Nuclear Insurance Association of Canada or any other insurer or group or pool of insurers or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability;
   c. "Bodily injury" or "property damage" resulting directly or indirectly from the nuclear energy hazard arising from:
      1) the ownership, maintenance, operation or use of a nuclear facility by or on behalf of an insured;
      2) the furnishing by an insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility;
      3) the possession, consumption, use, handling, disposal or transportation of fissionable substances, or of other radioactive material (except radioactive isotopes, away from a nuclear facility, which have reached the final stage of fabrication so as to be useable for any scientific, medical, agricultural, commercial or industrial purpose) used, distributed, handled or sold by an insured.

   As used in this policy:

   1) The term "nuclear energy hazard" means the radioactive, toxic, explosive, or other hazardous properties of radioactive material;
   2) The term "radioactive material" means uranium, thorium, plutonium, neptunium, their respective derivatives and compounds, radioactive isotopes of other elements and any other substances that the Atomic Energy Control Board may, by regulation, designate as being prescribed substances capable of releasing atomic energy, or as being requisite for the production, use or application of atomic energy;
   3) The term "nuclear facility" means:
      a) any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of plutonium, thorium and uranium or any one or more of them;
      b) any equipment or device designed or used for (i) separating the isotopes of plutonium, thorium and uranium or any one or more of them, (ii) processing or utilizing spent fuel, or (iii) handling, processing or packaging waste;
      c) any equipment or device used for the processing, fabricating or alloying of plutonium, thorium or uranium enriched in the isotope uranium 233 or in the isotope uranium 235, or any one or more of them if at any time the total amount of such material in the custody of the insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235;
      d) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste radioactive material;

      and includes the site on which any of the foregoing is located, together with all operations conducted thereon and all premises used for such operations.
   4) The term "fissionable substance" means any prescribed substance that is, or from which can be obtained, a substance capable of releasing atomic energy by nuclear fission.

3. **War Risks**
   "Bodily injury" or "property damage" due to war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military power.

SUPPLEMENTARY PAYMENTS – COVERAGES A, B AND D

We will pay, with respect to any claim or "action" we defend:

- a. All expenses we incur.
- b. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
- c. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defence of the claim or "action", including actual loss of earnings up to $100. a day because of time off from work.
- d. All costs taxed against the insured in the "action" and any interest accruing after entry of judgment upon that part of the judgment which is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:
   - a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
   - b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
   - c. An organization other than a partnership or joint venture, you are an insured. Your executive officers and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
2. Each of the following is also an insured:
   - a. Your employees, other than your executive officers, but only for acts within the scope of their employment by you. However, none of these employees is an insured for:
     - 1) "Bodily injury" or "personal injury" to you or to a co-employee while in the course of his or her employment; or
     - 2) "Bodily injury" or "personal injury" to any person who at the time of injury is entitled to benefits under any workers compensation or disability benefits law or a similar law; or
     - 3) "Bodily injury" or "personal injury" arising out of his or her providing or failing to provide professional health care services; or
     - 4) "Property damage" to property owned or occupied by or rented or loaned to that employee, any of your other employees, or any of your partners or members (if you are a partnership or joint venture).
   - b. Any person (other than your employee), or any organization while acting as your real estate manager.
   - c. Any person or organization having proper temporary custody of your property if you die, but only:
     - 1) With respect to liability arising out of the maintenance or use of that property; and
     - 2) Until your legal representative has been appointed.
   - d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this policy.
3. Any organization you newly acquire or form, other than a partnership or joint venture, and over which you maintain ownership or majority interest, will be deemed to be a Named Insured if there is no other similar insurance available to that organization. However:
   - a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;
   - b. Coverages A and D do not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and
   - c. Coverage B does not apply to "personal injury" arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership or joint venture that is not shown as a Named Insured in the Declarations.

SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance stated in the Declarations and the rules below fix the most we will pay regardless of the number of
   - a. Insureds;
   - b. Claims made or "actions" brought; or
   - c. Persons or organizations making claims or bringing "actions".
2. The Aggregate Limit is the most we will pay for the sum of:
   - a. Medical expenses under Coverage C; and
   - b. Compensatory damages under Coverage A, Coverage B and Coverage D.
3. Subject to 2. above, the Each Occurrence Limit is the most we will pay for the sum of:
   - a. Compensatory damages under Coverage A and Coverage D; and
   - b. Medical expenses under Coverage C;

   because of all "bodily injury" and "property damage" arising out of any one "occurrence".
4. Subject to 2. above, the Personal Injury Limit is the most we will pay under Coverage B for the sum of all compensatory damages because of all "personal injury" sustained by any one person or organization.
5. Subject to 3. above, the Tenants' Legal Liability Limit is the most we will pay under Coverage D for compensatory damages because of "property damage" to any one premises.
6. Subject to 3. above, the Medical Expense Limit is the most we will pay under Coverage C for all medical expenses because of "bodily injury" sustained by any one person.

The limits of this policy apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

1. **Bankruptcy.**
   Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this policy.
2. **Canadian Currency Clause.**
   All limits of insurance, premiums and other amounts as expressed in this policy are in Canadian Currency.
3. **Cancellation.**
   - a. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us in advance written notice of cancellation.
   - b. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:
     - 1) 15 days before the effective date of cancellation if we cancel for nonpayment of premium; or
     - 2) 30 days before the effective date of cancellation if we cancel for any other reason.

Except in Quebec, if notice is mailed, cancellation takes effect 15 or 30 days after receipt of the letter by the post office to which it is addressed, depending upon the reason for cancellation. Proof of mailing will be sufficient proof of notice.

In Quebec, cancellation takes effect either 15 or 30 days after receipt of the notice at the last known address of the first Named Insured, depending upon the reason for cancellation.

c. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.

d. The policy period will end on the date cancellation takes effect.

e. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.

4. **Changes.**

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

5. **Duties in the Event of Occurrence, Claim or Action.**

a. You must see to it that we are notified as soon as practicable of an "occurrence" which may result in a claim. Notice should include:
   1) How, when and where the "occurrence" took place; and
   2) The names and addresses of any injured persons and witnesses; and
   3) The nature and location of any injury or damage arising out of the "occurrence".

   Notice of an "occurrence" is not notice of a claim.

b. If a claim is received by any insured you must:
   1) Immediately record the specifics of the claim and the date received; and
   2) Notify us as soon as practicable.

   You must see to it that we receive written notice of the claim as soon as practicable.

c. You and any other involved insured must:
   1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or an "action";
   2) Authorize us to obtain records and other information;
   3) Cooperate with us in the investigation, settlement or defence of the claim or "action"; and
   4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insureds will, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

6. **Examination of Your Books and Records.**

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.

7. **Inspections and Surveys.**

We have the right but are not obligated to:

a. Make inspections and surveys at any time;

b. Give you reports on the conditions we find; and

c. Recommend any changes.

Any inspections, surveys, reports or recommendations relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:

a. Are safe or healthful; or

b. Comply with laws, regulations, codes or standards.

This condition applies not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

8. **Legal Action Against Us.**

No person or organization has a right under this policy:

a. To join us as a party or otherwise bring us into an "action" asking for compensatory damages from an insured; or

b. To sue us on this policy unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial; but we will not be liable for compensatory damages that are not payable under the terms of this policy or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative. Every "action" or proceeding against us shall be commenced within one year next after the date of such judgment or agreed settlement and not afterwards. If this policy is governed by the law of Quebec every "action" or proceeding against us shall be commenced within three years from the time the right of action arises.

9. **Other Insurance.**

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A, B or D of this policy, our obligations are limited as follows:

a. **Primary Insurance**

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

b. **Excess Insurance**

This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis:
   1) That is effective prior to the beginning of the policy period shown in the Declarations of this insurance and applies to "bodily injury" or "property damage" on other than a claims made basis, if:
      a) No Retroactive Date is shown in the Declarations of this insurance; or
      b) The other insurance has a policy period which continues after the Retroactive Date shown in the Declarations of this insurance;
   2) That is Property Insurance such as, but not limited to, Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work" or for premises rented to you; or
   3) If the loss arises out of the maintenance or use of watercraft to the extent not subject to Exclusion f. of Coverage A (Section I).

When this insurance is excess, we will have no duty under Coverage A, B or D to defend any claim or "action" that any other insurer has a duty to defend. If no other insurer defends, we will undertake to do so, but we will be entitled to all the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this policy.

c. Method of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

10. Premium Audit.

a. We will compute all premiums for this policy in accordance with our rules and rates.

b. Premium shown in this policy as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period. Audit premiums are due and payable on notice to the first Named Insured. If the sum of the advance and audit premiums paid for the policy term is greater than the earned premium, we will return the excess to the first Named Insured subject to the retention of the minimum premium shown in the Declarations of this policy.

c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

11. Premiums.

The first Named Insured shown in the Declarations:

a. Is responsible for the payment of all premiums; and

b. Will be the payee for any return premiums we pay.

12. Representations.

By accepting this policy, you agree:

a. The statements in the Declarations are accurate and complete;

b. Those statements are based upon representations you made to us; and

c. We have issued this policy in reliance upon your representations.

13. Separation of Insureds, Cross Liability.

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned to the first Named Insured, this insurance applies:

a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "action" is brought.

14. Transfer of Rights of Recovery Against Others to Us.

If the insured has rights to recover all or part of any payment we have made under this policy, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "action" or transfer those rights to us and help us enforce them.

15. Transfer of Your Rights and Duties Under this Policy.

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual Named Insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

SECTION V – EXTENDED REPORTING PERIODS

1. We will provide an automatic Extended Reporting Period as described in paragraph 3 or, if you purchase it, an Extended Reporting Period Endorsement as described in paragraph 4, only if:

   a. This policy is cancelled or not renewed for any reason except non payment of the premium;

   b. We renew or replace this policy with other insurance that:

      1) Provides claims made coverage for Bodily Injury and Property Damage Liability; and

      2) Has a Retroactive Date later than the one shown in this policy's Declarations; or

   c. We replace this policy with other insurance that applies to "bodily injury" or "property damage" on other than a claims made basis.

2. If we provide an Extended Reporting Period, the following is added to paragraph 1 of SECTION I – COVERAGES A AND D:

   A claim first made during the Extended Reporting Period will be deemed to have been made on the last day of the policy period provided that the claim is for compensatory damages because of "bodily injury" or "property damage" that occurred before the end of the policy period of this policy (but not before any applicable Retroactive Date).

   The Extended Reporting Period will not reinstate or increase the Limits of Insurance or extend the policy period.

3. The automatic Extended Reporting Period will be as set forth in either a. or b. below:

   a. 60 days, starting with the end of the policy period of this policy.

   b. Five years, starting with the end of the policy period of this policy. This automatic Extended Reporting Period applies only to claims as a result of an "occurrence" of which we are notified after the Retroactive Date, if any, shown in the Declarations but not later than 60 days after the end of the policy period of this policy. Notification of the "occurrence" must be in accordance with paragraph 5.a. of SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS (Duties in The Event of Occurrence, Claim or Action).

   These automatic Extended Reporting Periods apply only if no subsequent insurance you purchase applies to the claim, or would apply but for the exhaustion of its applicable limit of insurance.

   These automatic Extended Reporting Periods may not be cancelled.

4. If you purchase the optional Extended Reporting Period Endorsement, the extended reporting period will be an unlimited time, starting with the end of the policy period of this policy. We will issue that Endorsement if the first Named Insured shown in the Declarations:

   1) Makes a written request for it which we receive within 60 days after the end of the policy period; and

   2) Promptly pays the additional premium when due.

   The Extended Reporting Period Endorsement will not take effect unless the additional premium is paid when due. If that premium is paid when due, the endorsement may not be cancelled.

   The Extended Reporting Period Endorsement will also amend paragraph 9.b. of SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITION (Other Insurance) so that the insurance provided will be excess over any other valid and collectible insurance available to the insured, whether primary, excess, contingent or on any other basis, whose policy period begins or continues after the Endorsement takes effect.

We will determine the actual premium for the Extended Reporting Period Endorsement in accordance with our rules and rates.

The premium for the Extended Reporting Period Endorsement will not exceed 200% of the annual premium for this policy to which the endorsement would be attached and will be fully earned when the Endorsement takes effect.

SECTION VI – DEFINITIONS

1. "Action" means a civil proceeding in which compensatory damages because of "bodily injury", "property damage" or "personal injury" to which this insurance applies are alleged. "Action" includes an arbitration proceeding alleging such damages to which you must submit or submit with our consent.

2. "Automobile" means any self-propelled land motor vehicle, trailer or semi-trailer (including machinery, apparatus, or equipment attached thereto) which is principally designed and is being used for transportation of persons or property on public roads.

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

4. "Coverage territory" means:
   a. Canada and the United States of America (including its territories and possessions);
   b. International waters or airspace, provided the injury or damage does not occur in the course of travel or transportation to or from any place not included in a. above; or
   c. All parts of the world if:
      1) The injury or damage arises out of:
         a) Goods or products made or sold by you in the territory described in a. above; or
         b) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; and
      2) The insured's responsibility to pay compensatory damages is determined in an "action" on the merits, in the territory described in a. above or in a settlement we agree to in writing.
5. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:
   a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
   b. You have failed to fulfill the terms of a contract or agreement;

   if such property can be restored to use by:
   a. The repair, replacement, adjustment or removal of "your product" or "your work"; or
   b. Your fulfilling the terms of the contract or agreement.
6. "Insured contract" means:
   a. A lease of premises;
   b. A sidetrack agreement;
   c. An easement or license agreement in connection with vehicle or pedestrian private railroad crossings at grade;
   d. Any other easement agreement;
   e. An indemnification of a municipality as required by ordinance, except in connection with work for a municipality;
   f. An elevator maintenance agreement; or
   g. That part of any other contract or agreement pertaining to your business under which you assume the tort liability of another to pay compensatory damages because of "bodily injury" or "property damage" to a third person or organization, if the contract or agreement is made prior to the "bodily injury" or "property damage." Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

   An "insured contract" does not include that part of any contract or agreement:
   1) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
      a) Preparing, approving or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications; or
      b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage;
   2) Under which the insured, if an architect, engineer or surveyor, assumes liability for injury or damage arising out of the insured's rendering or failing to render professional services, including those listed in 1) above and supervisory, inspection or engineering services.
7. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
8. "Personal injury" means injury, other than "bodily injury", arising out of one or more of the following offences:
   a. False arrest, detention or imprisonment;
   b. Malicious prosecution;
   c. Wrongful entry into, or eviction of a person from, a room, dwelling or premises that the person occupies;
   d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
   e. Oral or written publication of material that violates a person's right of privacy.
9. a. "Products-completed operations hazard" includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
      1) Products that are still in your physical possession; or
      2) Work that has not yet been completed or abandoned.
   b. "Your work" will be deemed completed at the earliest of the following times:
      1) When all of the work called for in your contract has been completed.
      2) When all of the work to be done at the site has been completed if your contract calls for work at more than one site.
      3) When that part of work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

      Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.
   c. This hazard does not include "bodily injury" or "property damage" arising out of the existence of tools, uninstalled equipment or abandoned or unused materials.
10. "Property damage" means:
    a. Physical injury to tangible property, including all resulting loss of use of that property; or
    b. Loss of use of tangible property that is not physically injured.
11. "Your product" means:
    a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
       1) You;
       2) Others trading under your name; or
       3) A person or organization whose business or assets you have acquired; and
    b. Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

    "Your product" includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in a. and b. above.

    "Your product" does not include vending machines or other property rented to or located for the use of others but not sold.
12. "Your work" means:
    a. Work or operations performed by you or on your behalf; and
    b. Materials, parts or equipment furnished in connection with such work or operations.

    "Your work" includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in a. or b. above.

Appendix "C"

IBC 2190
8-87

Commercial General Liability Policy

INSURANCE CO.

Head Office – Canada

POLICY NO.

Agent/Broker

In return for the payment of the premium, and subject to all the terms of this policy, we agree with you to provide the insurance as stated in this policy.

DECLARATIONS"

1. Named Insured

Address

2. Policy Period From	Day Month Year	To	Day Month Year	12:01 A.M., Standard Time, at your address shown above.

3. LIMITS OF INSURANCE

AGGREGATE LIMIT	Each Occurrence Limit	Personal Injury Limit	Tenants' Legal Liability Limit	Medical Expense Limit
$	$	$	$ Any One Premises	$ Any One Person

4. Form of Business:
INDIVIDUAL ☐ JOINT VENTURE ☐ PARTNERSHIP ☐ ORGANIZATION ☐ (Other than Partnership or Joint Venture)

5. Business Description: ______________________________

6. Location of All Premises You Own, Rent or Occupy:
____
____

7. Classification	Code No.	Premium Basis	Rate	Advance Premium

8. Minimum Premium $__________ TOTAL PREMIUM $__________

9. Endorsements Attached To This Policy:

COUNTERSIGNED BY ______________________________ by ______________________________
(Date) (Authorized Representative)

____
(Insurer's Signature)

Commercial General Liability Policy

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.

The word "insured" means any person or organization qualifying as such under SECTION II – WHO IS AN INSURED.

Other words and phrases that appear in quotation marks have special meaning.

SECTION I – COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. **Insuring Agreement.**
   a. We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGES A, B AND D. This insurance applies only to "bodily injury" and "property damage" which occurs during the policy period. The "bodily injury" or "property damage" must be caused by an "occurrence". The "occurrence" must take place in the "coverage territory". We will have the right and duty to defend any "action" seeking those compensatory damages but:
      1) The amount we will pay for compensatory damages is limited as described in SECTION III – LIMITS OF INSURANCE.
      2) We may investigate and settle any claim or "action" at our discretion; and
      3) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A, B or D or medical expenses under Coverage C.

   b. Compensatory damages because of "bodily injury" include compensatory damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

   c. "Property damage" that is loss of use of tangible property that is not physically injured shall be deemed to occur at the time of the "occurrence" that caused it.

2. **Exclusions.**

   This insurance does not apply to:

   a. "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

   b. "Bodily injury" or "property damage" for which the insured is obligated to pay compensatory damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for compensatory damages:
      1) Assumed in a contract or agreement that is an "insured contract"; or
      2) That the insured would have in the absence of the contract or agreement.

   c. Any obligation of the insured under a workers compensation, disability benefits or unemployment compensation law or any similar law.

   d. "Bodily injury" to an employee of the insured arising out of and in the course of employment by the insured.

      This exclusion applies:
      a) Whether the insured may be liable as an employer or in any other capacity; and
      b) To any obligation to share compensatory damages with or repay someone else who must pay compensatory damages because of the injury.

      This exclusion does not apply:
      i) To liability assumed by the insured under an "insured contract"; or
      ii) To employees on whose behalf contributions are made by or required to be made by the insured under the provisions of any workers compensation law.

   e. 1) "Bodily injury" or "property damage" arising out of the ownership, use or operation by or on behalf of any insured of:
         a) Any "automobile";
         b) Any motorized snow vehicle or its trailers;
         c) Any vehicle while being used in any speed or demolition contest or in any stunting activity or in practice or preparation for any such contest or activity; or
         d) Any vehicle which if it were to be insured would be required by law to be insured under a contract evidenced by a motor vehicle liability policy, or any vehicle insured under such a contract, but this exclusion does not apply to the ownership, use or operation of machinery, apparatus or equipment mounted on or attached to any vehicle while at the site of the use or operation of such equipment.
      2) "Bodily injury" or "property damage" with respect to which any motor vehicle liability policy is in effect or would be in effect but for its termination upon exhaustion of its limit of liability or is required by law to be in effect.

   This Exclusion e. does not apply to "bodily injury" to an employee of the insured on whose behalf contributions are made by or required to be made by the insured under the provisions of any workers compensation law.

   f. "Bodily injury" or "property damage" arising out of the ownership, maintenance, use, operation, loading or unloading, or entrustment to others, by or on behalf of any insured of any watercraft.

      This exclusion does not apply to:
      1) A watercraft while ashore on premises you own or rent;
      2) A watercraft you do not own that is:
         a) Less than 8 metres long; and
         b) Not being used to carry persons or property for a charge.
      3) "Bodily injury" to an employee of the insured on whose behalf contributions are made by or required to be made by the insured under the provisions of any workers compensation law.

   g. 1) "Bodily injury" or "property damage" arising out of the ownership, maintenance, use, operation, loading or unloading, or the entrustment to others, by or on behalf of any insured of:
         a) Any aircraft; or
         b) Any air cushion vehicle.
      2) "Bodily injury" or "property damage" arising out of the ownership, existence, use or operation by or on behalf of any insured of any premises for the purpose of an airport or aircraft landing area and all operations necessary or incidental thereto.

   h. "Property damage" to:
      1) Property you own, rent, or occupy;
      2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
      3) Property loaned to you;
      4) Personal property in your care, custody or control;
      5) That particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the "property damage" arises out of those operations; or
      6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

      Paragraph 2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

      Paragraphs 3), 4), 5) and 6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph 6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

i. "Property damage" to "your product" arising out of it or any part of it.

j. "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

k. "Property damage" to "impaired property" or property that has not been physically injured, arising out of:

1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

l. Any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

1) "Your product";

2) "Your work"; or

3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

m. Pollution Liability – See Common Exclusions.

n. Nuclear Liability – See Common Exclusions.

o. War Risks – See Common Exclusions.

COVERAGE B. PERSONAL INJURY LIABILITY

1. **Insuring Agreement.**

a. We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "personal injury" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGES A, B AND D. We will have the right and duty to defend any "action" seeking those compensatory damages but:

1) The amount we will pay for compensatory damages is limited as described in SECTION III – LIMITS OF INSURANCE;

2) We may investigate and settle any claim or "action" at our discretion; and

3) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A, B or D or medical expenses under Coverage C.

b. This insurance applies to "personal injury" only if caused by an offence:

1) Committed in the "coverage territory" during the policy period; and

2) Arising out of the conduct of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you.

2. **Exclusions.**

This insurance does not apply to:

"Personal injury"

1) Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;

2) Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;

3) Arising out of the wilful violation of a penal statute or ordinance committed by or with the consent of the insured; or

4) For which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for compensatory damages that the insured would have in the absence of the contract or agreement.

COVERAGE C. MEDICAL PAYMENTS

1. **Insuring Agreement.**

a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

1) On premises you own or rent;

2) On ways next to premises you own or rent; or

3) Because of your operations;

provided that:

a) The accident takes place in the "coverage territory" and during the policy period;

b) The expenses are incurred and reported to us within one year of the date of the accident; and

c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

1) First aid at the time of an accident;

2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and

3) Necessary ambulance, hospital, professional nursing and funeral services.

2. **Exclusions.**

We will not pay expenses for "bodily injury":

a. To any insured.

b. To a person hired to do work for or on behalf of any insured or a tenant of any insured.

c. To a person injured on that part of premises you own or rent that the person normally occupies.

d. To a person, whether or not an employee of any insured, who at the time of injury is entitled to benefits under any workers compensation or disability benefits law or a similar law.

e. To a person injured while taking part in athletics.

f. The payment of which is prohibited by law.

g. Included within the "products-completed operations hazard".

h. Excluded under Coverage A.

COVERAGE D. TENANTS' LEGAL LIABILITY

1. **Insuring Agreement.**

We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "property damage" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGES A,B AND D. This insurance applies only to "property damage" caused by fire, explosion, smoke or leakage from fire protective equipment to premises rented to you or occupied by you. This insurance applies only to "property damage" which occurs during the policy period. The "property damage" must be caused by an "occurrence". The "occurrence" must take place in the "coverage territory". We will have the right and duty to defend any "action" seeking those compensatory damages but:

a. The amount we will pay for compensatory damages is limited as described in SECTION III – LIMITS OF INSURANCE;

b. We may investigate and settle any claim or "action" at our discretion; and

c. Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A, B or D or medical expenses under Coverage C.

2. **Exclusions.**

This insurance does not apply to:

a. "Property damage" expected or intended from the standpoint of the insured.

b. "Property damage" for which the insured is obligated to pay by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for compensatory damages that the insured would have in the absence of the contract or agreement.

c. Pollution Liability – See Common Exclusions.

d. Nuclear Energy Liability – See Common Exclusions.

e. War Risks – See Common Exclusions.

COMMON EXCLUSIONS – COVERAGES A, C AND D

This insurance does not apply to:

1. **Pollution Liability**

a. "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:

1) At or from premises owned, rented or occupied by an insured;

2) At or from any site or location used by or for an insured or others for the handling, storage, disposal, processing or treatment of waste;

3) Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for an insured or any person or organization for whom the insured may be legally responsible; or

4) At or from any site or location on which an insured or any contractors or subcontractors working directly or indirectly on behalf of an insured are performing operations:

a) if the pollutants are brought on or to the site or location in connection with such operations; or

b) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

b. Any loss, cost, or expense arising out of any governmental direction or request that an insured test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

"Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Sub-paragraphs 1) and 4)a) of paragraph a. of this exclusion do not apply to "bodily injury" or "property damage" caused by heat, smoke or fumes from a hostile fire. As used in this exclusion, a "hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.

2. **Nuclear Energy Liability**

a. Liability imposed by or arising under the Nuclear Liability Act;

b. "Bodily injury" or "property damage" with respect to which an insured under this policy is also insured under a contract of nuclear energy liability insurance (whether the insured is unnamed in such contract and whether or not it is legally enforceable by the insured) issued by the Nuclear Insurance Association of Canada or any other insurer or group or pool of insurers or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability;

c. "Bodily injury" or "property damage" resulting directly or indirectly from the nuclear energy hazard arising from:

1) the ownership, maintenance, operation or use of a nuclear facility by or on behalf of an insured;

2) the furnishing by an insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility;

3) the possession, consumption, use, handling, disposal or transportation of fissionable substances, or of other radioactive material (except radioactive isotopes, away from a nuclear facility, which have reached the final stage of fabrication so as to be useable for any scientific, medical, agricultural, commercial or industrial purpose) used, distributed, handled or sold by an insured.

As used in this policy:

1) The term "nuclear energy hazard" means the radioactive, toxic, explosive, or other hazardous properties of radioactive material;

2) The term "radioactive material" means uranium, thorium, plutonium, neptunium, their respective derivatives and compounds, radioactive isotopes of other elements and any other substances that the Atomic Energy Control Board may, by regulation, designate as being prescribed substances capable of releasing atomic energy, or as being requisite for the production, use or application of atomic energy;

3) The term "nuclear facility" means:

a) any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of plutonium, thorium and uranium or any one or more of them;

b) any equipment or device designed or used for (i) separating the isotopes of plutonium, thorium and uranium or any one or more of them, (ii) processing or utilizing spent fuel, or (iii) handling, processing or packaging waste;

c) any equipment or device used for the processing, fabricating or alloying of plutonium, thorium or uranium enriched in the isotope uranium 233 or in the isotope uranium 235, or any one or more of them if at any time the total amount of such material in the custody of the insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235;

d) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste radioactive material;

and includes the site on which any of the foregoing is located, together with all operations conducted thereon and all premises used for such operations.

4) The term "fissionable substance" means any prescribed substance that is, or from which can be obtained, a substance capable of releasing atomic energy by nuclear fission.

3. **War Risks**

"Bodily injury" or "property damage" due to war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military power.

SUPPLEMENTARY PAYMENTS – COVERAGES A, B AND D

We will pay, with respect to any claim or "action" we defend:

a. All expenses we incur.

b. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.

c. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defence of the claim or "action", including actual loss of earnings up to $100. a day because of time off from work.

d. All costs taxed against the insured in the "action" and any interest accruing after entry of judgment upon that part of the judgment which is within the applicable limit of insurance.

These payments will not reduce the limits of insurance

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:

   a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.

   b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.

   c. An organization other than a partnership or joint venture, you are an insured. Your executive officers and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

2. Each of the following is also an insured:

   a. Your employees, other than your executive officers, but only for acts within the scope of their employment by you. However, none of these employees is an insured for:

      1) "Bodily injury" or "personal injury" to you or to a co-employee while in the course of his or her employment; or

      2) "Bodily injury" or "personal injury" to any person who at the time of injury is entitled to benefits under any workers compensation or disability benefits law or a similar law; or

      3) "Bodily injury" or "personal injury" arising out of his or her providing or failing to provide professional health care services; or

      4) "Property damage" to property owned or occupied by or rented or loaned to that employee, any of your other employees, or any of your partners or members (if you are a partnership or joint venture).

   b. Any person (other than your employee), or any organization while acting as your real estate manager.

   c. Any person or organization having proper temporary custody of your property if you die, but only:

      1) With respect to liability arising out of the maintenance or use of that property; and

      2) Until your legal representative has been appointed.

   d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this policy.

3. Any organization you newly acquire or form, other than a partnership or joint venture, and over which you maintain ownership or majority interest, will be deemed to be a Named Insured if there is no other similar insurance available to that organization. However:

   a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;

   b. Coverages A and D do not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and

   c. Coverage B does not apply to "personal injury" arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership or joint venture that is not shown as a Named Insured in the Declarations.

SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance stated in the Declarations and the rules below fix the most we will pay regardless of the number of:

   a. Insureds;

   b. Claims made or "actions" brought; or

   c. Persons or organizations making claims or bringing "actions".

2. The Aggregate Limit is the most we will pay for the sum of:

   a. Medical expenses under Coverage C; and

   b. Compensatory damages under Coverage A, Coverage B and Coverage D.

3. Subject to 2. above, the Each Occurrence Limit is the most we will pay for the sum of:

   a. Compensatory damages under Coverage A and Coverage D; and

   b. Medical expenses under Coverage C;

   because of all "bodily injury" and "property damage" arising out of any one "occurrence".

4. Subject to 2. above, the Personal Injury Limit is the most we will pay under Coverage B for the sum of all compensatory damages because of all "personal injury" sustained by any one person or organization.

5. Subject to 3. above, the Tenants' Legal Liability Limit is the most we will pay under Coverage D for compensatory damages because of "property damage" to any one premises.

6. Subject to 3. above, the Medical Expense Limit is the most we will pay under Coverage C for all medical expenses because of "bodily injury" sustained by any one person.

The limits of this policy apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

1. **Bankruptcy.**

   Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this policy.

2. **Canadian Currency Clause.**

   All limits of insurance, premiums and other amounts as expressed in this policy are in Canadian currency.

3. **Cancellation.**

   a. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.

   b. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:

      1) 15 days before the effective date of cancellation if we cancel for nonpayment of premium; or

      2) 30 days before the effective date of cancellation if we cancel for any other reason.

      Except in Quebec, if notice is mailed, cancellation takes effect 15 or 30 days after receipt of the letter by the post office to which it is addressed, depending upon the reason for cancellation. Proof of mailing will be sufficient proof of notice.

      In Quebec, cancellation takes effect either 15 or 30 days after receipt of the notice at the last known address of the first Named Insured, depending upon the reason for cancellation.

   c. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.

   d. The policy period will end on the date cancellation takes effect.

   e. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.

4. **Changes.**

   This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

5. Duties in the Event of Occurrence, Claim or Action.

a. You must see to it that we are notified promptly of an "occurrence" which may result in a claim. Notice should include:
   1) How, when and where the "occurrence" took place; and
   2) The names and addresses of any injured persons and of witnesses.

b. If a claim is made or "action" is brought against any insured, you must see to it that we receive prompt written notice of the claim or "action".

c. You and any other involved insured must:
   1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "action";
   2) Authorize us to obtain records and other information;
   3) Cooperate with us in the investigation, settlement or defence of the claim or "action"; and
   4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insureds will, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

6. Examination of Your Books and Records.

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.

7. Inspections and Surveys.

We have the right but are not obligated to:

a. Make inspections and surveys at any time;

b. Give you reports on the conditions we find; and

c. Recommend any changes.

Any inspections, surveys, reports or recommendations relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:

a. Are safe or healthful; or

b. Comply with laws, regulations, codes or standards.

This condition applies not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

8. Legal Action Against Us.

No person or organization has a right under this policy:

a. To join us as a party or otherwise bring us into an "action" asking for compensatory damages from an insured; or

b. To sue us on this policy unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial; but we will not be liable for compensatory damages that are not payable under the terms of this policy or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative. Every "action" or proceeding against us shall be commenced within one year next after the date of such judgment or agreed settlement and not afterwards. If this policy is governed by the law of Quebec every action or proceeding against us shall be commenced within three years from the time the right of action arises.

9. Other Insurance.

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A, B or D of this policy our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

b. Excess Insurance

This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis:

1) That is Property Insurance such as, but not limited to, Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work" or for premises rented to you; or

2) If the loss arises out of the maintenance or use of watercraft to the extent not subject to Exclusion f. of Coverage A (Section I).

When this insurance is excess, we will have no duty under Coverage A, B or D to defend any claim or "action" that any other insurer has a duty to defend. If no other insurer defends, we will undertake to do so, but we will be entitled to all the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this policy.

c. Method of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

10. Premium Audit.

a. We will compute all premiums for this policy in accordance with our rules and rates.

b. Premium shown in this policy as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period. Audit premiums are due and payable on notice to the first Named Insured. If the sum of the advance and audit premiums paid for the policy term is greater than the earned premium, we will return the excess to the first Named Insured subject to the retention of the minimum premium shown in the Declarations of this policy.

c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

11. Premiums.

The first Named Insured shown in the Declarations:

a. Is responsible for the payment of all premiums; and

b. Will be the payee for any return premiums we pay.

12. Representations.

By accepting this policy, you agree:

a. The statements in the Declarations are accurate and complete;

b. Those statements are based upon representations you made to us; and

c. We have issued this policy in reliance upon your representations.

13. **Separation of Insureds, Cross Liability.**
Except with respect to the Limits of Insurance, and any rights or duties specifically assigned to the first Named Insured, this insurance applies:
a. As if each Named Insured were the only Named Insured; and
b. Separately to each insured against whom claim is made or "action" is brought.

14. **Transfer of Rights of Recovery Against Others to Us.**
If the insured has rights to recover all or part of any payment we have made under this policy, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "action" or transfer those rights to us and help us enforce them.

15. **Transfer of your Rights and Duties Under this Policy.**
Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual Named Insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

SECTION V – DEFINITIONS

1. "**Action**" means a civil proceeding in which compensatory damages because of "bodily injury", "property damage" or "personal injury" to which this insurance applies are alleged. "Action" includes an arbitration proceeding alleging such damages to which you must submit or submit with our consent.
2. "**Automobile**" means any self-propelled land motor vehicle, trailer or semi-trailer (including machinery, apparatus, or equipment attached thereto) which is principally designed and is being used for transportation of persons or property on public roads.
3. "**Bodily injury**" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
4. "**Coverage territory**" means:
   a. Canada and the United States of America (including its territories and possessions);
   b. International waters or airspace, provided the injury or damage does not occur in the course of travel or transportation to or from any place not included in a. above; or
   c. All parts of the world if:
      1) The injury or damage arises out of:
         a) Goods or products made or sold by you in the territory described in a. above; or
         b) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; and
      2) The insured's responsibility to pay compensatory damages is determined in an "action" on the merits, in the territory described in a. above or in a settlement we agree to in writing.
5. "**Impaired property**" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:
   a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
   b. You have failed to fulfill the terms of a contract or agreement;

   if such property can be restored to use by:
   a. The repair, replacement, adjustment or removal of "your product" or "your work"; or
   b. Your fulfilling the terms of the contract or agreement.
6. "**Insured contract**" means:
   a. A lease of premises;
   b. A sidetrack agreement;
   c. An easement or license agreement in connection with vehicle or pedestrian private railroad crossings at grade;
   d. Any other easement agreement;
   e. An indemnification of a municipality as required by ordinance, except in connection with work for a municipality;
   f. An elevator maintenance agreement; or
   g. That part of any other contract or agreement pertaining to your business under which you assume the tort liability of another to pay compensatory damages because of "bodily injury" or "property damage" to a third person or organization, if the contract or agreement is made prior to the "bodily injury" or "property damage". Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

   An "insured contract" does not include that part of any contract or agreement:
   1) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
      a) Preparing, approving or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications; or
      b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage;
   2) Under which the insured, if an architect, engineer or surveyor, assumes liability for injury or damage arising out of the insured's rendering or failing to render professional services, including those listed in 1) above and supervisory, inspection or engineering services.
7. "**Occurrence**" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
8. "**Personal injury**" means injury, other than "bodily injury", arising out of one or more of the following offences:
   a. False arrest, detention or imprisonment;
   b. Malicious prosecution;
   c. Wrongful entry into, or eviction of a person from, a room, dwelling or premises that the person occupies;
   d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
   e. Oral or written publication of material that violates a person's right of privacy.
9. a. "**Products-completed operations hazard**" includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
      1) Products that are still in your physical possession; or
      2) Work that has not yet been completed or abandoned.
   b. "Your work" will be deemed completed at the earliest of the following times:
      1) When all of the work called for in your contract has been completed.
      2) When all of the work to be done at the site has been completed if your contract calls for work at more than one site.
      3) When that part of work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

      Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.
   c. This hazard does not include "bodily injury" or "property damage" arising out of the existence of tools, uninstalled equipment or abandoned or unused materials.

10 "Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property, or
- b. Loss of use of tangible property that is not physically injured.

11 "Your product" means:

- a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
  - 1) You;
  - 2) Others trading under your name; or
  - 3) A person or organization whose business or assets you have acquired; and
- b. Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

"Your product" includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in a. and b. above.

"Your product" does not include vending machines or other property rented to or located for the use of others but not sold.

12 "Your work" means:

- a. Work or operations performed by you or on your behalf; and
- b. Materials, parts or equipment furnished in connection with such work or operations.

"Your work" includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in a. or b. above.

Vita

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YEAR OF BIRTH: 1956

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RELATED WORK EXPERIENCE: Mrs. Sanderson articled with Code Hunter, Barristers and Solicitors, Calgary, Alberta and has practiced in Calgary since August of 1983. She is currently with Fenerty Docken, Barristers & Solicitors, where her practice is devoted almost exclusively to insurance litigation.